FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 9 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 59

CARL ALDO MARZANI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

OSMOND K. FRAENKEL,
120 Broadway,
New York City, N. Y.;

ALLAN R. ROSENBERG,
934 Bowen Building,
Washington 5, D. C.;

Attorneys for Petitioner.

INDEX

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	3
Specification of Errors Assigned	5
Statement of Case	5
Summary of Argument	18
Argument	24
POINT I. The False Claims Act Is Not Applicable to the Trial of Counts X and XI. If Applicable, It Is Invalid Because of Indefiniteness Under the Fifth and Sixth Amendments to the Constitution.	24
A. The Statute Is Inapplicable to the False Statements in the Trial of Counts X and XI	27
B. If Applicable, the Statute Is Invalid Because of Indefiniteness	35
POINT II. Petitioner Was Deprived of Due Process and a Fair Trial, in Violation of the Fifth and Sixth Amendments to the Constitution and His Rights Were Substantially Prejudiced by Having Been Indicted, Tried, Convicted and Sentenced for Eleven Violations When Only Two Violations of the False Claims Act Could Validly Have Been Involved	40

PAGE

A. Prejudicial Error in the Inclusion as Issues on the Trial and the Submission to the Jury of the First Nine Counts of the Indictment... 42

B. Prejudicial Error in the Admission of Evidence of Other Different Crimes 51

C. Prejudicial Error in the Admission of Evidence of Other Similar Crimes 61

D. Petitioner Was Erroneously Sentenced 74

E. Conclusion 76

POINT III. The Court Below Erred in Sustaining the Judgment on Counts X and XI Because of the Application by the Trial Court of a Unique Standard for the Admission of Evidence Relating to Negroes and a Negro Organization, Based on the Supposed Susceptibility to Prejudice of the Predominantly Negro Jury in the Case, Contrary to the Public Policy of the United States and in Deprivation of Petitioner's Rights to Due Process and an Impartial Trial Before a Representative Jury, Under the Fifth and Sixth Amendments to the Constitution 77

A. The Exclusion of Evidence Relating to Police Brutality Against Negroes 79

B. Limitation on the Cross Examination of Drew as to His Activities as an Agent Provocateur. 83

C. Limitation on the Cross Examination of Harper and Drew with respect to the National Negro Congress 101

D. The Failure to Treat the Predominantly Negro Jury as a Representative Jury 104

Conclusion 107

CITATIONS

PAGE

CASES:

Alford v. *United States*, 282 U. S. 687 (1931) . . . 89, 92, 93, 97, 100, 105

Ballard v. *United States*, 329 U. S. 187 (1946) 78

Banning v. *United States*, 130 F. 2d 330, 339 (C. C. A. 6, 1942) 93

Bass v. *United States*, 20 App. D. C. 232 (1902) 43

Beaux Art Dresses v. *United States*, 9 F. 2d 531, (C. C. A. 2, 1925); cert. denied 270 U. S. 644 (sub nom. *Todd* v. *United States*) 43

Blockburger v. *United States*, 284 U. S. 299 (1932) . 42, 63

Boyd v. *United States*, 142 U. S. 454 (1891) 54, 69

Boyer v. *United States*, 132 F. 2d 12 (App. D. C. 1942) 54, 65, 66, 68

Braverman v. *United States*, 317 U. S. 49 (1942) . . . 63, 76

Bridges v. *Wixon*, 326 U. S. 135 (1945) 53

Brown v. *Walker*, 161 U. S. 591 (1896) 50

Cain v. *United States*, 19 F. 2d 472 (C. C. A. 8, 1927) . 63

Castellini v. *United States*, 64 F. 2d 636 (C. C. A. 6, 1933) 43

Claasen v. *United States*, 142 U. S. 146 (1891) . 5, 22, 74, 75

Colyer v. *Skeffington*, 265 F. 17, 69 (D. C. Mass. 1920) 77, 95

Connally v. *General Construction Co.*, 269 U. S. 385 (1936) 36

Costello, In re, D. C. D. C. June 27, 1947 (unreported) 48

Coulston v. *United States*, 51 F. 2d 178 (C. C. A. 10, 1931) 43, 54

Coyne v. *United States*, 246 F. 120 (C. C. A. 5th, 1917) 43

Cratty v. *United States*, 163 F. 2d 844 (App. D. C., 1947) 94

De Luca v. *United States*, 299 F. 741 (C. C. A. 2, 1924) 43

Dewitt v. *Skinner*, 232 F. 443 (C. C. A. 8, 1916) 91

PAGE

District of Columbia v. *Clawans*, 300 U. S. 617 (1937) 93, 94, 100
Doyle, In re, 42 F. 2d 686; rev'd *U. S.* v. *Doyle*, 47 F. 2d 1086 (C. C. A. 2nd, 1931) 50
Dwyer v. *United States*, 170 F. 160 (C. C. A. 9, 1909) 74, 76

Ebeling v. *Morgan*, 237 U. S. 625 (1915) 42, 63
Ewing v. *United States*, 77 U. S. App. D. C. 14, 135 F. 2d 633 (1942), cert. denied 318 U. S. 776 .... 98, 99, 100

Fierstein, Ex Parte, 41 F. 2d 53 (C. C. A. 9th, 1930). 53
Fox v. *Washington*, 236 U. S. 273 36
Fulton v. *United States*, 45 App. D. C. 27, 42 (1916) .75, 76

Garber v. *United States*, 145 F. 2d 966 (C. C. A. 6, 1944) 93
Gavieres v. *United States*, 220 U. S. 338 (1911) 42
Gitlow v. *New York*, 268 U. S. 652 (1925) 12

Hale v. *Henkel*, 201 U. S. 43, 57 (1906) 50
Hall v. *United States*, 150 U. S. 76 (1893) 54
Hamner v. *United States*, 134 F. 2d 592 ..... 31, 37
Hanley v. *State*, 28 Tex. App. 375, 13 S. W. 142 54
Heard v. *United States*, 255 F. 829 (C. C. A. 8, 1919) 89, 91
Hurd v. *Hodge*, 334 U. S. 24, decided May 3, 1948 ... 107
Hurtado v. *California*, 110 U. S. 516 (1884) 107
Husty v. *United States*, 282 U. S. 694 (1931) 75

Kempe v. *United States*, 151 F. 2d 680 (C. C. A. 8, 1945) 54
Kessler v. *Strecker*, 307 U. S. 22, 30 (1938) 53
Kotteakos v. *United States*, 328 U. S. 750 (1946) ... 4, 63, 71, 77

Laughlin v. *United States*, 67 App. D. C. 355, 92 F. 2d 506 68

MacKreth v. *United States*, 103 F. 2d 495 (C. C. A. 5, 1939) 55

PAGE

Majestic v. *Louisville & N. R. Co.*, 147 F. 2 621 (C. C. A. 6, 1945) 93
McCandless v. *United States*, 298 U. S. 342 (1936) .89, 90
McElroy v. *United States*, 164 U. S. 76 (1896) 43, 44
Mencher v. *Chesley*, 61 N. Y. S. 2d 147 (1947) 48
Morton v. *United States*, 60 F. 2d 696, 699 (C. C. A. 7, 1932) cert. denied 288 U. S. 607 .....93, 100
Muller v. *Territory of Oklahoma*, 149 F. 330, 335 (C. C. A. 8, 1906) 93

Nash v. *United States*, 229 U. S. 373 (1912) 48, 49
N. M. U. v. *Herzog*, 78 F. Supp. 146, 177 (D. C. D. C., 1948) 53

Oliver, In re, 92 L. ed. 492 (1948) 38
Orloff v. *United States*, 153 F. 2d 292 (C. C. A. 6, 1946) 54, 69, 70

Patrilo v. *United States*, 7 F. 2d 804 (C. C. A. 8, 1925) 63
Patton v. *Mississippi*, 332 U. S. 463 (1947) 78
Peo. v. *Fultz*, 109 Calif. 258, 41 Pac. 1040 54
Philadelphia T. R. Co. v. *Stimpson*, 14 Pet. 448, 10 L. Ed. 535 91
Pinkerton v. *United States*, 328 U. S. 640 (1946) 75
Pointer v. *United States*, 151 U. S. 396 (1894) 43
Pullman v. *Hall*, 55 F. 2d 139 (C. C. A. 4th, 1932) 98

Railton v. *United States*, 127 F. 2d 691 (C. C. A. 5, 1942) 55

Sanford v. *United States*, 98 F. 2d 325 (App. D. C. 1938) 43
Schneiderman v. *United States*, 320 U. S. 118 (1943) 53
Screws v. *United States*, 325 U. S. 91 (1944) 36
Simon v. *United States*, 123 F. 2d 80, cert. denied (C. C. A. 4th, 1941), 314 U. S. 694 .....93, 98
Spanel v. *Pegler*, 160 F. 2d 619 (C. C. A. 7, 1947) 48
Spivey v. *United States*, 109 F. 2d 181 (C. C. A. 5, 1940) cert. denied 310 U. S. 631 .....33, 37

PAGE

Spring Drug Co. v. *United States*, 12 F. 2d 852 (C. C. A. 8, 1926) 75, 76

Terry v. *United States*, 131 F. 2d 40 (C. C. A. 8, 1942) 37
Thiel v. *Southern P. Co.*, 328 U. S. 217 (1946) 78
Thomas v. *United States*, 121 F. 2d 905 (App. D. C., 1941) 43
Thompson v. *United States*, 30 App. D. C. 352 43

United States v. *Barra*, 149 F. 2d 489 (C. C. A. 2, 1945) 33, 35
United States v. *Bell*, 81 F. 830 (C. C. W. D. Tenn., 1897) 35
United States v. *Center Veal and Beef Co.*, 162 F. 2d 766 (C. C. A. 2, 1947) 65
United States v. *Cohen Grocery Co.*, 255 U. S. 81 (1921) 36
United States v. *Crittenden*, 24 F. Supp. 84 37
United States v. *DeLorenzo*, 151 F. 2d 122 (C. C. A. 2, 1945) 33, 35
United States v. *Gilliland*, 312 U. S. 86 (1940) 3, 18, 19, 26, 27, 29, 31, 33, 35, 36, 38, 39, 54, 64
United States v. *Goldsmith*, 137 F. 2d 393 (C. C. A. 2, 1943), cert. denied 309 U. S. 678 65
United States v. *J. Greenbaum and Sons, Inc.*, 123 F. 2d 770 (C. C. A. 2, 1941) 65
United States v. *Heine*, 149 F. 2d 485 (C. C. A. 2, 1945) 33, 35
United States v. *Krulewich*, 145 F. 2d 76 (C. C. A. 2nd, 1944) 57
United States v. *Long*, 14 F. Supp. 29 31
United States v. *Lovett*, 328 U. S. 303 (1946) 38
United States v. *Meyer*, 140 F. 2d 652 (C. C. A. 2, 1944) 25, 26, 32, 35
United States v. *Presser*, 99 F. 2d 819 31
United States v. *Modern Reed and Rattan Co.*, 159 F. 2d 658 (C. C. A. 2, 1947) cert. denied 331 U. S. 831 54

PAGE

United States v. *Nickerson*, 58 U. S. 204 (1858) 1 Sprague 232 Fed. Cos. No. 15878..... 31
United States v. *Oppenheimer*, 242 U. S. 85 (1916)..43, 50
United States v. *Sanders*, 42 F. Supp. 436 (D. C. S. D. Texas, 1941) 37
United States v. *White*, 69 F. Supp. 562..... 37
United States v. *Zavala*, 139 F. 2d 830 (C. C. A. 2, 1944) 32, 35, 37
Williams v. *United States*, 168 U. S. 382, 391 (1897).. 43
Williamson v. *United States*, 207 U. S. 425 (1907)... 31
Winters v. *New York*, 333 U. S. 507 (1948)..... 36
Witters v. *United States*, 70 App. D. C. 316, 106 F. 2d 837, 125 A. L. R. 1031..... 68
Yasui v. *United States*, 320 U. S. 115 (1943)..... 75
Zedd v. *United States*, 11 F. 2d 96 (C. C. A. 4, 1926).. 43

STATUTES:

Alien Registration Act, 1940, 54 Stat. 670 U. S. C. Title 18, Secs. 9-17.....12, 53

False Claims Act (Sec. 35A of the Criminal Code, 18 U. S. C. 80, now 18 U. S. C. 1001)...2, 3, 25, 35, 54, 76

Judicial Code, Sec. 240(a), as amended by the Act of February 13, 1928 (28 U. S. C. Section 374(a)).. 2

Judicial Code, Sec. 269, as amended, 40 Stat. 1181 (1919) 28 U. S. C. A. Sec. 391 (1928)..... 4

New York Criminal Anarchy Act (New York Penal Laws, Secs. 160-166) 12, 53

Revised Title 18 U. S. C., Section 1001, effective September 1, 1948 (based on Title 18 U. S. C. 1940 ed. Section 80) 76

Seditious Conspiracy Act (35 Stat. 1089, U. S. C. Title 18, Section 6 (1909).....12, 53

5 U. S. C. 1940 ed. 652..... 29

PAGE

ARTICLES:

Gellhorn: Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193, 1217-1218 53
Note (1931) 29 Mich. L. Review 473, 480..... 68
Stone, The Rule of Exclusion of Similar Fact Evidence, America 51 Harv. L. Rev. 988, 1007..... 54

MISCELLANEOUS:

108 A. L. R. 1242..... 31
Civil Service Act, Rule XII.....29, 32, 33, 34
Civil Service Act, Rules and Regulations, Annotated (1943 ed., p. 283)..... 29
Departmental Circular 222 of the Civil Service Commission 29, 33, 34
Department of State, Justice, Commerce and the Judiciary Appropriation Act, 1947, Ch. 541, Pub. 490 [HR 6056] Title I, U. S. Code Congressional Service, 79th Cong, 2d Sess. 1946, pp. 441-442..... 32
Department of State Press Releases Nos. 798 (October 7, 1947), 874 (November 1, 1947), 886 (November 5, 1947), 960 (December 10, 1947)..... 30
Executive Order 9835, 12 Fed. Reg. 1935 (1947).... 29
13 Fed. Reg. 253 (1948)..... 30
Fed. R. Crim. P., 52(a)..... 4
Fed. R. Crim. P., 35..... 75
"To Secure These Rights", Report of the President's Committee on Civil Rights (1947), pp. 87-95..... 107
1 Wharton Criminal Evidence (11th ed. 1935) Sections 343, 365 .....54, 69
1 Wigmore on Evidence, 3rd ed. 1940, Sections 57, 192, 194; 2 ibid, Sections 302 ff, 305; 3 ibid, Sections 944, 948, 949, 963, 969, 980(a), 982, 987, 1000, 1006, 1020, 1021, 1022, 1023, 1810, 1885-1887, 1890, 2062 .....42, 43, 54, 55, 66, 72, 91, 92, 93, 99, 100
Webster's New International Dictionary, Second Edition, Unabridged 39

Supreme Court of the United States

OCTOBER TERM, 1948

No. 59

CARL ALDO MARZANI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals, dated February 2, 1948, appears at R. 272 and is reported at 168 F. (2d) 133. Its Opinion, dated April 22, 1948, denying petition for rehearing, appears at R. 292 and is reported at 168 F. (2d) 141. The opinion of the District Court, dated April 25, 1947, denying the motion to dismiss the indictment, appears at R. 20 and is reported at 71 F. Supp. 615.

Jurisdiction

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282). A petition for rehearing was

denied on April 22, 1948 (R. 294). The petition for writ of certiorari was filed on May 22, 1948 and was granted on June 21, 1948 (R. 295). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 374(a)) and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

Statutes Involved

The False Claims Act (Section 35A of the Criminal Code, 18 U. S. C. 80, now 18 U. S. C. 1001) provides:

"Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or *whoever shall knowingly and willfully* falsify or conceal or cover up by any trick, scheme or device a material fact or *make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder,* shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197 italics supplied.)

Other relevant provisions of the statutes involved are set forth in the Appendix to Petitioner's Brief, pp. 1-3.[1]

Questions Presented

Petitioner was convicted of eleven separate criminal violations of the False Claims Act. The court below held that the prosecution on the first nine counts of the indictment was barred by the statute of limitations (R. 274-276, 277) but affirmed the judgment of the District Court on the grounds that no prejudicial error was committed and that the sentence, which was general, could be sustained on the remaining two counts, which it held good. The following principal questions are raised by the opinions:

1. Was the False Claims Act validly applied, consistently with the protection of petitioner's rights secured by the Fifth and Sixth Amendments to the Constitution and with the decision of this Court in *United States* v. *Gilliland*, 312 U. S. 86 (1941), to the prosecution under Courts X and XI for false statements by one government employee to another in the same government department, in a private discussion held pursuant to no law, rule or regulation, but initiated solely at petitioner's request for the purpose of asking his superior in the department why petitioner had been asked to resign, where such statements were not under oath, not witnessed, not stenographically transcribed, never reduced to writing, and not required to be made, where the only two participants in the conference

[1]Hereinafter cited as App.

addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statements and where the statute makes punishable such statements under no more definite or ascertainable standards of guilt than that they be made "in any matter within the jurisdiction of any department or agency of the United States?

2. Was petitioner deprived of his rights to due process and a fair trial under the Fifth and Sixth Amendments to the Constitution, and substantially prejudiced within the meaning of the applicable rule[2] statute[3] and decision of this Court in *Kotteakos* v. *United States,* 328 U. S. 750 (1946) by reason of the inclusion of the nine barred counts as issues upon the trial, the submission of those counts to the jury and the admission of evidence relating to those counts, in a trial which, the Court below held, could validly involve only the remaining two counts, where (1) the nine barred counts contained additional and different issues and irrelevant, prejudicial and inflammatory matter, not included in the last two counts, (2) the evidence admitted under the barred counts established proof of nine separate crimes under the False Claims Act, of other crimes under other Federal and State laws, and of other prejudicial matter in the nature of crimes, (3) such proof was not admissible on any of the issues in the trial of the last two counts, and (4) in any event, the trial court did not give the jury precautionary instructions as to the purpose for which such proof should be considered?

---

[2]Fed. R. Crim. P., 52(a).

[3]Sec. 269 of the Judicial Code, as amended, 40 Stat. 1181 (1919), 28 U. S. C. A. Sec. 391 (1928) App. 1-2.

3. Was petitioner deprived of his rights under the Fifth Amendment to the Constitution by reason of the holding of the court below that the general sentence of one to three years imprisonment, imposed by the trial court, upon a verdict of guilty as to each of eleven separate counts, must be sustained, although nine of the counts were held on appeal to have been barred by the statute of limitations where petitioner's motion to dismiss these counts was preserved throughout the trial and the record otherwise rebuts the presumption of law applied in *Claasen's* case.[4]

4. Was petitioner deprived of liberty without due process of law and the right to an impartial trial by a representative jury, in contravention of his rights under the Fifth and Sixth Amendments, by reason of the application by the trial court of a unique test for the admissibility of evidence, based on the presence of nine Negroes on the jury, rather than a general standard applicable to any representative jury, and is the exercise of the supervisory power of this Court over the Courts of the District of Columbia properly invoked to correct the application of such a test?

Specification of Errors Assigned

Petitioner assigns as error by the Court below the affirmative answer to the first and the negative answers to the second, third and fourth of the foregoing questions.

Statement of Case

On January 17, 1947, petitioner was indicted in eleven counts for having made false and fraudulent statements in

---

[4]*Claasen* v. *United States*, 142 U. S. 146 (1891).

matters within the jurisdiction of departments and agencies of the United States in violation of the False Claims Act (R. 2-19).

The first nine counts of the indictment charged that the petitioner, while employed by the Federal government, and in the course of authorized investigations as to his character and fitness, falsely stated to representatives of the Federal Bureau of Investigation in 1942 and to representatives of the Civil Service Commission in 1942 and 1943 that he had never been a member of, never attended meetings of, never contributed services to, and never participated in the activities of the Communist Party, never used the name Tony Whales, and never made any speeches against conscription. The falsity of each of these statements is alleged in numerous and detailed particulars in certain of the counts. The remaining two counts charged that in 1946 petitioner, while so employed, falsely stated to a duly authorized representative of the State Department that he had never been a member of the Communist Party and had never used the name Tony Whales. In these counts, a single specification of falsity is alleged as to each statement.

The first nine counts cite as authority for the investigations in which the alleged false statements were made "statutes, rules and regulations of the United States and Executive Orders of the President of the United States".

POOR COPY

BLEED THROUGH

No similar authority is cited in the last two counts. For convenience, the indictment is summarized in the footnote.[5]

---

[5]

Count	Date of Statement	Nature of Statement	Number of Allegations as to Falsity	Investigation Made by Representative of	Authority Cited for Investigation	Petitioner Employed By
I.	July 29, 1942	Never a member of Communist Party	1	F.B.I.	Statutes, Rules and Regulations of the United States, and Executive Orders of the President of the United States	O.S.S.
II.	July 29, 1942	Never attended meetings of Communist Party	13	F.B.I.		O.S.S.
III.	July 29, 1942	Never contributed services to Communist Party	11	F.B.I.		O.S.S.
IV.	July 29, 1942	Never participated in activities of Communist Party	11	F.B.I.		O.S.S.
V.	Nov. 23, 1942	Never used the name Tony Whales	1	Civil Service Commission		O.S.S.
VI.	Nov. 23, 1942	Never a member of Communist Party	1	Civil Service Commission		O.S.S.
VII.	Nov. 23, 1942	Never made any speeches against conscription	2	Civil Service Commission		O.S.S.
VIII.	Apr. 20, 1943	Never used the name Tony Whales	1	Board of Appeals and Review of the Civil Service Commission		O.S.S.
IX.	Apr. 20, 1943	Never made any speeches against conscription	2	Board of Appeals and Review of the Civil Service Commission		O.S.S.
X.	June 1, 1946	Never a member of Communist Party	1	State Department	None	State Department
XI.	June 1, 1946	Never used the name Tony Whales	1	State Department	None	State Department

Before, during and at the close of the trial, petitioner moved to dismiss the indictment on the grounds, *inter alia*, that the statute, insofar as applicable to petitioner under the circumstances, was constitutionally invalid, because of indefiniteness, and that the first nine counts were barred by the statute of limitations (R. 20, 31, 33, 46). These motions having been denied by the trial court, the case was tried on all eleven counts, petitioner was found guilty on each count, and the court sentenced him generally to one to three years imprisonment on all eleven counts (R. 47).

Petitioner's Statements: In 1942, petitioner came to Washington and was employed by the Federal government in the Office of the Coordinator of Information and later in the Office of Strategic Services as a war service appointee, subject to a character and fitness examination. In the course of that examination, he was formally interrogated in 1942 by representatives of the F. B. I. and of the Civil Service Commission, and stated under oath that he was not and had never been a member of the Communist Party and that he had never attended its meetings, participated in its activities, contributed services to it, used the name Tony Whales or spoken against conscription (App. 19-23, 26, 44; R. 244-249; Tr. 116, 118-120, 159)[5a]. He was, nevertheless, rated ineligible for further responsible government employment. He appealed to the Board of Appeals and Review of the Commission in April, 1943, and in sworn testimony in a formal hearing before that Board, again stated that he had never used the name Tony Whales and had never made any speeches against conscription (App. 54-57, R. 249-250; Tr. 323). That Board in July, 1943 reversed the previous ruling and rated him eligible (App.

[5a]The reference "Tr." is to the original transcript of record certified to this Court by the court below.

POOR COPY

BLEED THROUGH

58-60). He continued as a civilian employee of the O. S. S. until inducted into the Army as a private. He was then reassigned, in military status, to his former position in the O. S. S. and after overseas service, was honorably discharged as a master sergeant (R. 173, 175). He remained in the employ of the O. S. S. and later of the State Department, to which his O. S. S. unit had been transferred. Having been requested, on April 30, 1946, to resign for security reasons, he sought an appointment with Panuch, Deputy Assistant Secretary for Administration, who was also his superior in the State Department, to ask an explanation, and to state his desire to resign but unwillingness to do so under fire (R. 178). At the ensuing meeting on June 1, 1946, between Panuch and petitioner, which was private and informal, petitioner again stated, in the course of a lengthy conversation covering a number of other matters, that he had never been a member of the Communist Party and had never used the name Tony Whales (R. 48-55). Thereafter, upon apparent assurances that his record was clear, petitioner resigned and entered private employment as a producer of films for labor unions (R. 59, 176-181, 202). Over a month after his resignation had been accepted, he was notified that he had been discharged from the State Department in the interest of the United States (Defendant's Exhibit No. 1, Government's Exhibit 18, App. 57, 63-64, 72).

Proof of the Falsity of Petitioner's Statements: The government introduced proof that during 1940-1941 when petitioner lived on the lower East Side of New York City and worked as an economics instructor at New York University, he was a member, organizer and educational director of a section or branch of the Communist Party; used the alias Tony Whales; attended numerous public and

private meetings of the Party; conducted study classes for it; spoke, under its auspices, against the Smith-Connally Bill, the Selective Service Bill, and other legislation; gave lectures on the principles of communism; advocated opposition to the entry of the United States into the war and the abolition of discrimination and segregation against Negroes; was active in assisting a branch of the National Negro Congress on the lower East Side; and performed such other services, and engaged in such other activities for the Party as collecting membership books and distributing tickets to a Soviet movie, then showing in New York City (R. 257-258, 260; 71-74, 82, 94-117, 121-122, 156-242).

Several matters arising from the conduct of the trial and the holdings of the court below require further statement to explain the basis in the record for the questions here presented. These matters are as follows:

The Interview with Panuch: The government concedes that the interview was requested by petitioner; that petitioner met and conferred privately with Panuch; that petitioner's statements were not under oath and not stenographically transcribed (Brief in Opposition to Petition, pp. 21, 22 R. 293.)[6] The government also concedes that the interview was not a formal removal proceeding, in conformity with regulations which provide for the hearing of charges against employees, but was instead a private conference to discuss Panuch's request that petitioner

---

[6]The government stated in the court below "On June 1, 1946, pursuant to his request for an interview, defendant met and conferred privately with Mr. Panuch. Defendant was not under oath and the proceedings were not transcribed (Brief for Appellee p. 3.) (R. 47-55).

POOR COPY

BLEED THROUGH

voluntarily resign.[7] It is undisputed that Panuch and petitioner were the only participants in the discussion (R. 48); that Panuch was not merely Deputy Assistant Secretary for Administration but petitioner's superior in channels, with whom petitioner had a friendly relationship and whom he saw frequently in the course of business (R. 48, 176, 179); that they addressed each other by their first names throughout the interview (R. 49, 50); that the interview lasted over two hours, covered a wide variety of topics (R. 52, 293); and was not preceded by any notice of charges to which petitioner was given an opportunity to reply in writing; that Panuch had never heard of the previous interrogations by the F. B. I. and the Commission, the hearing before the Board of Appeals and Review of the Commission, or the rating by the Commission that petitioner was eligible for government employment, until petitioner told him about them at the interview (R. 51, 52); and that Panuch never made or filed any written record or memorandum of the interview (R. 55). There is no contention that the interview was regulated by any law, rule or regulation of the State Department or the Commission, or otherwise, which required petitioner to appear, answer questions, or make statements, or defined his obligations, or established any procedural safeguards, or gave

---

[7] "It is idle to urge, as petitioner does, that the interview was not in conformity with regulations which provide for the hearing of charges against employees. Petitioner previously had had such hearings before the Civil Service Commission. . . . When he was requested to resign, he did not want or seek another hearing. Instead he wanted a private conference with the executive of the Department responsible for the request. (He) obtained precisely what he sought . . . (Brief in Opposition to Petition p. 22, ftn. 11) "He did not seek any formal hearing in an effort to have the request withdrawn." (Ibid p. 22).

him notice of the consequences of knowingly and willfully making any false or fraudulent statement. There is nothing in the record to show that this private, informal, unregulated discussion between two government employees was on the same level, or could reasonably be thought by petitioner to be of the same nature as the formal interrogations by the F. B. I. and the Commission or the hearing before the Board of Appeals and Review of the Commission, or had risen to the dignity of a "matter within the jurisdiction of the United States", as required by the statute.

The court below without adverting to the absence of pertinent laws or regulations, imposing such requirements and safeguards, held that the False Claims Act was applicable to false statements made under these circumstances because petitioner was engaged in "Official" discussions with his superior (R. 293). For reasons stated below this holding is assigned as error.

The Evidence Admitted Under the Nine Barred Counts of Other Crimes and Prejudicial Matter for which Petitioner was not Validly on Trial in the Last Two Counts:

1. The government's case as to the falsity of all of petitioner's statements charged as false in the indictment was limited to evidence of petitioner's activities in 1940-1941 in New York City. Included in such evidence was testimony tending to establish that petitioner was guilty of violations of the New York Anarchy Act (New York Penal Laws, Secs. 160-166, *Gitlow* v. *New York* 268 U. S. 652 (1925)), the Seditious Conspiracy Act (35 Stat. 1089, U. S. C. Title 18, Section 6 (1909), and the Alien Registration Act, 1940 (54 Stat. 670 U. S. C. Title 18, Secs. 9-17 (1940)), in that, in 1940, petitioner advocated, to a meeting sponsored by the National Negro Congress, a Communist revolution in the

POOR COPY

BLEED THROUGH

United States "now" (R. 116) and, in 1940, urged fellow-Communists that "now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the armed forces in order that the Communists may take over . . . overthrow the capitalists and also take over control of the Army" (R. 104). Such evidence was admitted under the specific allegations of Counts III(k) and IV(k) which allege such advocacy as proof of the falsity of petitioner's general statements to the F. B. I. in 1942 that he had never contributed services to or participated in the activities of the Communist Party (R. 5-9).

2. Also included in the evidence of petitioner's activities in 1940-1941 was testimony that petitioner had counselled and instructed Party members to infiltrate the National Negro Congress for the purpose of creating a Communist front organization and to sow resentment and discontent among Negroes by agitating questions of racial discrimination in order to recruit Party members (R. 74-78, 106-107, 112-113, 115-117) admitted under Counts III(e) and (h) and IV(e) and (h) (R. 5-9). In its effect upon the jury, such evidence is clearly as prejudicial as the proof of other crimes.

3. Other testimony was admitted, over objection, in connection with the proof under the first nine counts that petitioner had committed crimes, not charged in any count of the indictment, of false swearing to New York City welfare agents, or the WPA in 1939, about his financial condition, and family resources in connection with an application for relief (R. 49, 50, App. 26, 28, 33-37, 64-72) and of false statements to representatives of the Civil Service Commission in 1942, denying that his wife was a member

of the Communist Party (R. 49-50, 231, App. 26, 37-39). Petitioner's motions for mistrial and new trial based on the admission of this evidence were denied (R. 31, 46).

Petitioner contended to the court below that all of the foregoing evidence of crimes and in the nature of crimes was prejudicial and inadmissible in the trial of the last two counts, and, if admissible, was not safeguarded by the required precautionary instructions as to the limited purpose for which the jury might consider such evidence, without which its admission was prejudicial error.

The court below rejected petitioner's contentions. Insofar as it discussed the questions, it held that the evidence of petitioner's speeches admitted under the barred counts was admissible on the trial of the last two counts because such evidence was "consistent with (the) policies" of the Communist Party and therefore relevant upon the disputed issue of defendant's membership in the Communist Party under Count X (R. 277). There is no evidence whatsoever in this record as to the official advocacy by the Communist Party of revolution "now" the infiltration of the Army to overthrow the capitalists or the sowing of resentment and discontent among Negroes. The court rejected, *sub silentio*, petitioner's contentions that the admission of evidence of crimes not charged in any count of the indictment and the failure to give the required precautionary instructions with respect to all of the foregoing evidence were prejudicially erroneous. For reasons stated below, petitioner assigns these holdings as error.

To support each of the nine crimes charged in the first nine counts, the government introduced, as a part of its case in chief, documentary evidence of petitioner's sworn statements to the representatives of the F. B. I. in 1942

POOR COPY

BLEED THROUGH

and of the Commission in 1942 and 1943 (R. 244-254), identified by the stenographers who transcribed such statements and by the investigators who conducted the interrogations (Tr. 109-111, 116; 120, 125-126; 152, 154, 157; 194-195; 210, 216, 217-220; 227-228; 323).

That these nine statements constituted an indispensable part of the proof of nine crimes, each separate and distinct from the other, is clear beyond cavil. The trial court ruled that the statements were separate (R. 25-26). For having knowingly, willfully and falsely made them, petitioner was convicted of nine separate crimes.

Petitioner contended in the court below that it was prejudicial error to admit this evidence of nine separate crimes in the trial of the last two counts alone, because irrelevant to any of the issues there involved, and because, even if such evidence was admissible, the trial court failed to give the required precautionary instructions.

The court below, however, rejected these contentions, holding that the evidence was admissible in a trial of the last two counts, because the nine earlier statements were the same as or similar to the statements in the last two counts, and the nine statements were beneficial to defendant, rather than prejudicial, in that they showed that from a time close to the event, petitioner had consistently and undeviatingly maintained the same position (R. 277-278). For reasons stated below, petitioner assigns this holding as error.

The Trial Court's Failure to Treat the Predominantly Negro Jury as a Representative Jury and the Resulting Exclusion of Admissible Evidence Regarded as Too Prejudicial for This Jury to Consider:

The government's case as to the falsity of petitioner's statements was introduced through three witnesses (Hewitt,

Harper, Drew) who were Negroes. The subject matter of their testimony concerned in substantial part their own and petitioner's activities in connection with a branch of the National Negro Congress on the lower East Side in New York City in 1940 and 1942. Nine members of the jury which heard the case were Negroes. Petitioner is white (R. 70 et seq., 105 et seq., 254-255). These facts are not denied.

The effect of this combination of circumstances on the trial court's rulings is illustrated by the following three examples:

Harper testified that he had attended a Communist meeting at petitioner's home (R. 71-74, 76, 82). Petitioner sought to testify that the meeting was not a Communist meeting, and to identify the time and subject matter of the meeting by reference to an incident involving police brutality against two Negroes (R. 185-186). The trial court halted the testimony, held that the reference by petitioner to police brutality against Negroes had "other purposes", that "the prejudice has happened here" and that petitioner was significantly making use of such testimony to prejudice the jury (R. 186-189). Counsel for the government stated that "there could be no fair trial before *this* jury, if you go into the beatings" (R. 188, italics supplied) and announced the government's intention to move for a mistrial if the testimony persisted. The trial court thereupon limited petitoner's direct examination to avoid specific references to this incident of police brutality against Negroes (R. 188).

Drew, a member of the New York City Police Department, testified on direct examination, that pursuant to an official assignment, he had joined the Communist Party on the lower East Side as an undercover police agent, under a

POOR COPY

BLEED THROUGH

false name and with fictitious identifications, and had met and dealt with petitioner as a fellow Communist (R. 88-90, 92-117, 120-122). Included in Drew's direct examination and in the examination of Captain Gallagher, his superior officer in the Police Department, were incidental references to the fact that Drew had been assigned to investigate the National Negro Congress (R. 64-67, 70, 106) but that finding no branch of this organization on the lower East Side, he had created such a branch, solicited members for it, chaired its meetings, written pamphlets for it, become the head of it, spread its influence, sought the guidance of the Communist Party for it, and simultaneously reported on the activities of the organization and its members to the Police Department (R. 89-91, 106, 111-115, 117, 121, App. 61). Some of this testimony referred to events at which petitioner was not asserted to be present. Petitioner sought to cross examine as to all these activities to establish Drew in his setting as a police spy, to impeach his credibility and to show his bias, interest and misconduct as an *agent provocateur*. The trial court halted such cross examination, limited it to meetings where both Drew and petitioner were present, about which there had been testimony, curtailed cross examination as to credibility, even though Drew's testimony was largely uncorroborated and forbade certain questions altogether (R. 123-126, 105).

Captain Gallagher testified that the National Negro Congress was one of the "subversive" organizations which he had assigned for investigation (R. 64-66, 70). Harper, as well as Drew, testified about petitioner's activities on behalf of the National Negro Congress (R. 74-76, 83-84, 86, App. 60). Petitioner sought to cross examine both Harper and Drew as to the objects of the National Negro Congress to show that it was not "subversive" and that petitioner's

concern with it was in connection with non-subversive objects. The trial court refused to permit such cross-examination (R. 79-81).

Petitioner contended in the court below that all of the foregoing evidence was admissible, that the trial court excluded it solely because of its apprehension that the predominantly Negro jury could not consider the evidence on the same terms as any other representative jury, and that thereby petitioner was unconstitutionally denied due process and a fair trial before a representative jury.

The court below rejected petitioner's contentions and held that all of the rulings were correct and would have been the same regardless of the racial composition of the jury (R. 280). For reasons stated below, petitioner assigns these holdings as error.

Summary of Argument

I. The court below erred in upholding the judgment in Counts X and XI, because the False Claims Act is inapplicable to those counts, and, if applicable, is invalid because of indefiniteness.

A. The court below held the False Claims Act applicable, in the trial of those counts, although none of the limitations were there present which this Court applied in *United States* v. *Gilliland,* 312 U. S. 86 (1940), and which have been followed in all cases in the lower courts in which convictions have been sustained under the False Claims Act. The false statements involved in Counts X and XI were made in a private, informal, unregulated interview between petitioner and Panuch, his superior in office, initiated, at petitioner's request, to discuss the reasons why Panuch had requested petitioner voluntarily to resign from government

POOR COPY

BLEED THROUGH

employment. The interview was not a removal proceeding, in conformity with regulations which provide for a hearing of charges against employees. No law, rule or regulation required petitioner to be present or to make statements; his obligations were undefined; no suitable notice was given of the consequences of knowingly and wilfully making any false or fraudulent statements; and no procedural safeguards were provided. The holding of the court below is based on an inapplicable quotation from the opinion of this Court in the *Gilliland* case and on a misunderstanding of its decision. We submit that the False Claims Act is not applicable to the false statements in Counts X and XI.

B. By its terms, the False Claims Act applies to *any* false or fraudulent statement "in *any* matter within the jurisdiction of *any* department or agency of the United States." Its scope, thus, is co-extensive with the ever-widening scope of federal power, which is itself dependent upon the decisions of this Court. Absent some restrictive interpretation for its application, the statute would appear to be so broad and uncertain as to violate the requirement that every man is entitled to know with certainty when he is committing a crime and thus the constitutional guarantees of due process and specificity, under the Fifth and Sixth Amendments. This Court, however, has applied such a restrictive interpretation. In the *Gilliland* case, it upheld the False Claims Act, as against the objection that it was invalid because of indefiniteness, on the ground that the "Hot" Oil Act and pertinent regulations, in aid of whose enforcement the False Claims Act was invoked, imposed a duty to make statements to the government agency involved, adequately defined the duty, and provided suitable notice of consequences. The False Claims Act was held to be applicable as a fitting complement to other statutes

under which, in connection with the authorized action of government agencies, the presentation of statements is required. In the case at bar, the court below has departed from this restrictive interpretation. Without adverting to the fact that no law, rule or regulation enjoined an adequately described duty on petitioner requiring him to make statements, with suitable notice of consequences, it held that the False Claims Act was validly applied to effectuate a general requirement, with criminal sanctions, that a government employee, discussing officially with his superior an official matter within the jurisdiction of a government department, must be truthful. The government's supporting argument is that the discussion in which the alleged false statements were made was "serious", not "casual". These attempted distinctions do not bring the False Claims Act, as thus applied, within the constitutional guarantees. The words "official" and "serious" are no substitute for the criteria of obligation, definition and notice which are required to provide an ascertainable standard of guilt. Standing alone, unlimited by any such criteria, the False Claims Act covers so much that it effectively covers nothing. The record shows that it was so applied in the trial of Counts X and XI.

The judgment on those counts, therefore, cannot be sustained. Since the first nine counts of the indictment were properly held to have been barred by the statute of limitations, the case should be dismissed.

II. The court below erred in sustaining the judgment on Counts X and XI, because of the prejudicial error which resulted from petitioner's having been indicted, tried, convicted and sentenced for eleven violations, when only two violations of the False Claims Act could validly have been involved.

POOR COPY

BLEED THROUGH

A. Petitioner was substantially prejudiced by the submission to the jury and the inclusion as issues upon his trial of the nine barred counts. These counts were separate and distinct from the last two counts, involved different issues, and contained numerous charges of crimes and other prejudicial matter, not included in the last two counts. The submission of the first nine counts, on which no conviction had or could lawfully be obtained, was prejudicial error in the trial of the last two counts alone within the principle of those decisions which prohibit the admission in evidence of an indictment without proof of conviction. The inclusion of the first nine counts as issues in the trial of the last two counts was prejudicial error because it confused the issues involved in the last two counts and permitted the introduction of evidence, irrelevant to the issues in those counts, except for the prohibited purpose of proving petitioner's disposition to commit crime.

B. Petitioner was substantially prejudiced by the admission in the trial of the last two counts of evidence offered to prove or in connection with the proof of the allegations of falsity under the nine barred counts. Such evidence tended to establish that he had committed other different crimes of prohibited advocacy under other federal and state laws, and of false statements or perjury to federal and state agencies at other times and on a different subject from those involved in the last two counts, as well as deception and duplicity in the nature of crime which in its effect upon the jury was as prejudicial as the proof of other crimes. In the trial of the last two counts, this evidence was relevant only to prove petitioner's disposition to commit crimes, and, was, in any event, if admissible, not

submitted with the necessary precautionary instructions, without which its admission was prejudicial error.

C. Petitioner was substantially prejudiced by the admission in the trial of the last two counts of evidence offered to prove the false statements charged in the nine barred counts. The statements in these barred counts, as submitted, constituted the *sine qua non* of nine separate offenses, which were collateral to, and independent offenses in relation to the crimes charged under the last two counts. Their only relevance in the trial of the last two counts was to prove petitioner's disposition to lie and commit similar offenses. Even if the statements were admissible in the trial of the last two counts, they were not submitted with the required precautionary instructions, without which their admission was prejudicial error.

D. Petitioner was erroneously sentenced. The rule in *Claasen* v. *United States*, 142 U. S. 146 (1891) is not applicable here to sustain the general sentence imposed on separate verdicts on eleven counts, because this record amply rebuts the presumption of law that the court awarded sentence only on two good counts.

E. The trial court's error in denying the motion to dismiss the first nine counts of the indictment permeated the entire trial. It permitted the prosecuting attorney in his opening statement and the trial court in its instructions to put before the jury as additional and different issues upon the trial of the last two counts alone, accusations of crime which were barred and numerous allegations of prejudicial matter which should never have been included in the indictment. It led to the improper admission of evidence of nine

POOR COPY

BLEED THROUGH

separate crimes under the False Claims Act, of other irrelevant crimes under other federal and state laws and of other prejudicial matter in the nature of crimes, which prejudicially affected the verdict. It prevented petitioner from objecting to the admission of evidence and from requesting precautionary instructions. It permitted the jury to find petitioner guilty of nine crimes for which he was not validly on trial and led the trial court to misdirect the jury and to impose an erroneous sentence on counts which should not have been submitted.

In the total setting of this case, these errors fully warrant reversal of the judgment and a new trial.

III. The court below erred in sustaining the judgment on Counts X and XI because of the application of an unconstitutional standard by the trial court for the admission of evidence.

The record shows that the trial court excluded admissible evidence relating to Negroes and a Negro organization, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury. The evidence which was excluded was admissible as a matter of right on petitioner's part, under the ordinary rules of evidence, to rebut the testimony of prosecution witnesses and to test credibility by showing bias, interest and misconduct, in relation to matters, which, under applicable law, were not collateral and which petitioner would have been entitled to present on his own behalf. The court below has misconstrued the effect of the rulings and has failed to perceive the unconstitutional standard which the trial court applied. To

the extent that this evidence was admissible under the ordinary rules of evidence, its exclusion was error without regard to the motives of the trial court and cannot be justified, without violating constitutional guarantees, by the supposed susceptibility to prejudice of the predominantly Negro jury in the case. To the extent that the limitation of such evidence was subject to the trial court's discretion, the race and color of the jury was an improper and constitutionally prohibited basis for the exercise of that discretion.

We submit that the trial court's failure to treat the predominantly Negro jury in the case as a representative jury, as constitutionally required, necessitates a reversal of the judgment below and a new trial, and, as action contrary to the public policy of the United States, warrants correction by this Court in the exercise of its supervisory powers over the courts of the District of Columbia.

ARGUMENT

Point I

THE FALSE CLAIMS ACT IS NOT APPLICABLE TO THE TRIAL OF COUNTS X AND XI. IF APPLICABLE, IT IS INVALID BECAUSE OF INDEFINITENESS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

Since the Court below held that the first nine counts of the indictment were barred by the statute of limitations and the government has not sought to review that holding by cross-petition for certiorari, the only question remaining in the case is the validity of the judgment on counts X and XI. We shall in this point discuss the application of the statute to the trial on these counts, leaving to later discussion the other questions affecting the trial.

POOR COPY

BLEED THROUGH

Counts X and XI charge that petitioner, while employed in the State Department, wilfully and knowingly made false statements to duly authorized officer of that Department in a matter within its jurisdiction, namely, in an inquiry into the character and fitness of petitioner in relation to his continued employment (R. 17, 18). Each count deals with a separate statement made on a single occasion: the Xth charges petitioner with having falsely denied membership in the Communist Party (R. 17), the XIth with having falsely denied the use of an alias (R. 19).

The statute under which the indictment was found (18 U. S. C. 80) punishes the making of false statements wilfully and knowingly "in any matter within the jurisdiction of any department or agency of the United States * * *".

As the facts show (pp. 11-12, *supra*), this statute was here applied to punish statements made by one government employee to another in a private, informal and unregulated discussion, which was initiated by petitioner for the purpose of ascertaining why his resignation had been requested for security reasons (R. 47-49), where no law, rule or regulation of the State Department or of the Civil Service Commission, or otherwise, required petitioner to appear or make statements, where his obligations were undefined, no procedural safeguards were provided, and no suitable notice was given of the consequences of knowingly and wilfully making any false or fraudulent statements.

Petitioner contends that the False Claims Act is not applicable to punish false statements made under these circumstances, and that, if applicable, it is invalid because of indefiniteness under the Fifth and Sixth Amendments.

Petitioner first raised these contentions by motion to dismiss the indictment. The trial court summarily disposed of the motion (R. 25) by a mere reference to *United States*

v. *Meyer* 140 F 2d 652 (C. C. A. 2, 1944). The decision in that case, however, did not discuss any of the issues which have been raised in the case at bar. It held merely that the statute covered false statements, even though oral, made at a formal hearing conducted pursuant to regulations of which defendant had adequate notice. The further ruling that defendant could not in a trial under the False Claims Act collaterally attack the constitutionality of the Executive Order which set up the Exclusion Board before which he appeared has, of course, no bearing in the case at bar, since no similar issue is here involved. The decision therefore is not authority for the contention that the False Claims Act applies to statements made in an informal interview not held pursuant to any statute or regulation.

Petitioner again raised the question of the inapplicability and the unconstitutional indefiniteness of the statute by appropriate motions at the end of the government's case, (R. 31) at the end of petitioner's case (R. 31, 33) and for a new trial (R. 46). The trial court denied these motions without further discussion.

The court below also rejected petitioner's contentions. It held that since the interview concerned a matter within the jurisdiction of a department of the United States, the statute was applicable, without limitation, to any false statement made in that interview (R. 293). It did not refer to petitioner's claim that the interview had no basis in any statute or regulations, which enjoined any duty on petitioner to make statements or described the subject matter, or gave him suitable notice of the consequences of making false statements. The only support cited by the court below for its holding is a passage from the opinion of this Court in *United States* v. *Gilliland*, 312 U. S. 86, at 93 (1941) (R.

POOR COPY

BLEED THROUGH

293) which is wholly inapplicable. As the context of the passage clearly shows, this Court merely held that in the light of the 1934 Amendment to the statute, the statute was no longer restricted to false statements involving pecuniary or property loss to the government. The language quoted by the court below bears only on that phase of the statute and is not authority for a decision that the statute in its present form is applicable, without any other limitations.

The court below disposed of petitioner's further contention that the statute, if applicable, was invalid because indefinite by asserting that there was "no ambiguity in the language" of the statute "which would place in doubt the requirement that a government employee, discussing officially with his superior an official request for his resignation, must be truthful" (R. 293). The opinion contains no discussion of the need for any limitation of the statute, such as that discussed by this court in the *Gilliland* case at p. 91 of its opinion, and apparently rests its denial of the constitutional objection entirely on the ground that the interview was "official".

We submit that the court below has misconstrued the statute, contrary to the decision of this court in the *Gilliland* case and has thereby permitted its application in violation of petitioner's rights under the Fifth and Sixth Amendments.

A. The statute is inapplicable to the false statements in the trial of Counts X and XI.

The *Gilliland* case involved affidavits and reports which were required to be made, on approved forms, to a Federal Tender Board established by the Secretary of the Interior, under regulations authorized by and for the enforcement of the "Hot Oil" Act. This Court held that the False Claims Act was applicable to punish such statements, if

false, not only because the statements manifestly related to a matter within the jurisdiction of a department of the United States but also, because:

"The statute (cannot) be deemed to be invalid because of indefiniteness. The affidavits and reports *required* had been sufficiently described and the *duty enjoined* had been *adequately defined*. Any one presenting the *required* affidavits and reports to the Board set up under the *pertinent regulations* was *suitable charged with notice of the consequences* of knowingly and wilfully including therein any false and fraudulent statements. . . . The Act of 1934 (The False Claims Act), with its provisions as to false and fraudulent papers, has its place as a *fitting complement* to the Act of 1935 (the "Hot Oil" Act) as well as other statutes, under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc. is *required*" (ibid. pp. 91, 95-96, italics supplied).

The opinion thus indicates that the False Claims Act is constitutionally applicable under the following limitations: (1) it must be a complement to some other statute or authorized regulation, in aid of their enforcement; (2) that other statute or regulation must require the making of statements in a matter within the jurisdiction of a department or agency of the United States; (3) the duty enjoined by such statute or regulations to make such statements must be adequately defined; and (4) there must be suitable notice of the consequences if the required statements are false or fraudulent and knowingly and wilfully made.

We submit that the False Claims Act was not applied in conformity with these limitations in the trial of Counts X and XI in the case at bar.

POOR COPY

BLEED THROUGH

It cannot be disputed that there is here involved no other statute or regulation imposing any requirement on petitioner to make any statement, to which the False Claims Act might be a fitting complement.[8] It should be borne in mind that the interview with Panuch was not a proceeding to remove petitioner as an employee, e.g. under the provisions of Civil Service Rule XII,[9] but a purely informal conference, growing out of a request that petitioner voluntarily resign. Moreover, it was held at petitioner's own request, and not at Panuch's direction.

The interview was not in conformity with the provisions of Rule XII, or Departmental Circular 222 of the Commission (Government Exhibit 24, App. 48, 49) which require written notice of the charges against the employee, with reasons given, a reasonable time for personally answering the same in writing, with affidavits, and a trial or hearing in the discretion of the removing officer, the record in the case to be made a part of the records of the department. Review by the Commission is provided for failure to follow this procedure. It was not in conformity with the requirements of the President's Loyalty Order of March 21, 1947,[10] or the

---

[8]It is not enough, therefore, that the State Department Appropriation Act, to which the government refers (Brief in Opposition to Petition p. 20 R. 23-24), prohibits the payment of salary to persons who advocate or belong to organizations which advocate the overthrow of the government by force or violence. Pretermitting for the moment the question of whether the Communist Party is such an organization, the holding of the *Gilliland* case requires not merely that the inquiry relate to a matter within the jurisdiction of the United States, but that the law or regulation, to which the False Claims Act is a complement, must require a statement to be made about that matter.

[9]5 U. S. C. 1940 ed. 652; Civil Service Act, Rules and Regulations Annotated (1943 ed.) p. 283.

[10]Executive Order 9835. 12 Fed. Reg. 1935 (1947).

regulations of the Loyalty Review Board, pursuant to the Order,[11] which require that the employee charged with disloyalty shall be served a notice in writing at least thirty days in advance of the proposed removal, with the following information: a statement of the charges, the right to answer in writing within a reasonable time, the right to a hearing before a board, at which he is entitled to appear personally with counsel of his own choosing and to present evidence in his own behalf. The hearing in such cases is required to be "conducted in an orderly manner and in a serious business-like atmosphere of dignity and decorum. . . . The testimony shall be taken under oath or affirmation (and) shall be recorded and transcribed and made a permanent part of the record in the case (or) by suitable notes . . . which shall be summarized and agreed to by all parties".[12] It was not in conformity with Hearing Procedures of the Personnel Security Board of the State Department, effective October 7, 1947,[13] which require the employee to be served with a written prior notice of hearing and the charges, where possible, and accord him the privilege of answering the charges, of appearing with counsel in his own behalf, of presenting sworn testimony, if he so requests, and of refusing to answer any questions, with a stenotypist record to be made of the testimony.

Since the interview with Panuch in this case did not relate to any removal procedures but was a discussion about a suggested voluntary resignation, it was not called for by any statute or regulations and was conducted entirely without the procedures or safeguards established by any regulations. The government, moreover, in effect concedes that

---

[11]13 Fed. Reg. 253 (1948).

[12]Ibid. 256.

[13]Department of State Press Release No. 798, October 7, 1947. See also Department of State Press Release No. 874 (November 1, 1947), 886 (November 5, 1947) and 960 (December 10, 1947).

POOR COPY

BLEED THROUGH

in this case the interview was not in conformity with any regulations (Brief in Opposition to Petition, p. 22, ftn. 11). Moreover, in the framing of the indictment the government recognized that there was a difference between this situation and the other occasions on which it claimed petitioner made false statements. In each of the first nine counts of the indictment it is alleged that the investigation in the course of which the false statement was made was being conducted "under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States" (R. 3, 4, 6, 8, 10, 11, 12, 14 and 15. See App. 47-48). No similar statement is contained in the last counts (R. 17, 18).

The need for a statutory obligation to make a statement has been recognized under the authorities. *United States* v. *Gilliland, supra.* In *United States* v. *Long,* 14 F. Supp. 29, the Court held that a statement made voluntarily and not pursuant to some requirement of the law was not included within the statute (See Judge A. N. Hand's interpretation of this decision in *United States* v. *Presser,* 99 F. 2d 819, at p. 822). In *Hamner* v. *United States,* 134 F. 2d 592, a conviction under one count was reversed because the false statement which formed the basis of that count did not relate to anything which the pertinent regulations required to be stated. This is in accord with the familiar principle that a false sworn statement is not punishable under the perjury statutes, if not required to be made by pertinent law or regulations (See *United States* v. *Nickerson,* 58 U. S. 204 (1858), 1 Sprague 232 Fed. Cos. No. 15878. *Williamson* v. *United States,* 207 U. S. 425 (1907); 108 A. L. R. 1242.

No case has been found in which a conviction has been upheld, under the False Claims Act, where the statement claimed to have been false was not required to be made by

some law or regulation or where some procedure was not established which imposed at least a conditional duty to make a statement because of the possible adverse consequences which might result from not making a statement. The *Meyers* case, which we have already discussed, comes within the last described category. While the regulations did not compel Meyers to appear before the exclusion board, it was evident that if he did not appear he would be excluded; thus there was at least a conditional duty imposed upon him. Here, the only action that could then[13a] be taken against petitioner if he refused to resign would be to prefer charges against him in conformity with Civil Service Rule XII. This would have changed the situation from one where the statements were voluntary to one where they were required, at last conditionally.

Obviously if there is a duty imposed, the scope of that duty must be defined. It is because of the existence of such duty and definition that convictions were upheld in the two cases relied upon by the government in its brief in opposition to the petition for certiorari (p. 21 and ftn. 10).

Thus, in *United States* v. *Zavala*, 139 F. 2d 830 (C. C. A. 2, 1944), the false statement was contained in a customs declaration, the making of which was required by regulations which were specifically called to the attention of the accused. The only question in the case was whether or not it made any difference that an amendment made at the dock was written out by the inspector rather than by the accused. The Court ruled that the act of the inspector, having been approved by the accused, was the act of the accused.

[13a]The so-called "McCarran Rider", permitting removal of any employee of the State Department, notwithstanding the provision of any other law, was not enacted until July 5, 1946 (Department of State, Justice, Commerce and the Judiciary Appropriation Act, 1947, ch. 541, Pub. 490 [HR 6056] Title I, U. S. Code Congressional Service, 79th Cong. 2nd Sess. 1946, pp. 441-442).

POOR COPY

BLEED THROUGH

In *Spivey* v. *United States*, 109 F. 2d 181 (C. C. A. 5, 1940), cert. den. 310 U. S. 631, the false statements were made in Commodity Credit Corporation producers' cotton notes given as security for loans under applicable regulations. Besides, there was much more involved in that case than mere false statements and the applicability of the statute, as construed in the *Gilliland* case, was never seriously in question.

To like effect see:

United States v. *Heine*,
149 F. 2d 485 (C. C. A. 2, 1945) and

United States v. *Barra*,
149 F. 2d 489 (C. C. A. 2, 1945) (false statements in application for a certificate of identification required by Presidential Proclamation and procured in accordance with detailed regulations of Attorney General.)

United States v. *De Lorenzo*,
151 F. 2d 122 (C. C. A. 2, 1945) (false statement in an application for federal employment subject to certification by Civil Service Commission, of which defendant was aware.)

There was here nothing in the circumstances of the interview with Panuch which defined the scope of any duty on petitioner's part. The issues were not defined by any prior notice of charges in writing, with opportunity to petitioner to answer in writing, with affidavits, or otherwise, as they would have been if the interview were in conformity with Civil Service Rule XII, Departmental Circular 222, the Loyalty Regulations or the Hearing Procedures of the Personnel Security Board of the State Department.

In the absence of such devices for definition, and in the further absence of the record of the prior hearings before the F. B. I. and the Commission, of which Panuch was completely ignorant, the discussion covered a wide variety of topics, apparently lasted as long as the Panuch and petitioner had anything to discuss, and was not confined to any specific issue.

Finally, in the absence of pertinent laws or regulations, there was nothing in the circumstances of the interview which suitably charged petitioner with notice of the consequences of knowingly and wilfully making any false or fraudulent statements. The interview was private; his statements were not under oath; no stenographer was present to record what he said; Panuch gave no indication that the interview was of enough importance to require any written memorandum of it, and, in fact, Panuch never made or filed such a memorandum. The interview was not conducted in a "serious businesslike atmosphere of dignity and decorum." Petitioner and Panuch addressed each other as "Joe" and "Carl" throughout the interview and were obviously on an informal basis, which was consistent with their friendly relationship. In respect to notice of consequences, there was no indication that the present interview differed from many others, in which petitioner saw Panuch in the ordinary course of business.

This requirement of notice of consequences is implicit in Civil Service Rule XII, with its provisions for notice of charges with reasons given and opportunity to answer, with affidavits, and in the similar provisions of Departmental Circular 222; it is more fully implicit in the Hearing Procedures of the State Department and the President's Loyalty Order, with their additional provisions, requiring testimony under oath, permitting the right of counsel, and

POOR COPY

BLEED THROUGH

the right to refuse to answer questions, with a transcript made of the statements.

No case has been found upholding a conviction under the False Claims Act, where such notice was not provided by the statute, rule or regulation which required the statement to be presented or by the circumstances involved. See *United States* v. *Meyer, United States* v. *Heine, United States* v. *Barra, United States* v. *Zavola, United States* v. *DeLorenzo, supra.*

In the absence of such notice, the statute becomes a trap for the unwary[14] and fails to meet one of the essential criteria for its applicability, under the *Gilliland* case.

In short, none of the elements was here present which have been required in all the cases in which convictions have been sustained. We submit that the False Claims Act is inapplicable to the trial of Counts X and XI.

B. If applicable, the Statute is Invalid because of Indefiniteness.

The legislative history and terms of the False Claims Act, as construed by this Court in the *Gilliland* case, clearly indicate that the purpose of the statute was to aid in the enforcement of other laws which require the presentation of statements to departments or agencies of the United States in particular matters within their jurisdiction. The court below, however, has held that the False Claims Act can be applied, not to aid in the enforcement of other laws of this description, but to effectuate a general requirement, with criminal sanctions, that government employees, discussing any official matter within the jurisdiction of a department or agency of the United States with their superiors, must be truthful (R. 293). If the False Claims

[14]See *United States* v. *Bell,* 81 F. 830, 839, 853 (C. C. W. D. Tenn. 1897).

Act, standing alone, applies in this broad way, the issue is raised as to whether it can be validly applied, consistently with the requirements of due process and specificity under the Fifth and Sixth Amendments.

We submit that unless the applicability of the statute is limited, in the manner indicated by this Court in the *Gilliland* case, it falls under that line of decisions of this Court which have struck down vague and general laws, as providing no ascertainable standard of guilt.

Sometimes it has not been found possible to find any limitation upon the words used sufficient to sustain the law. This was so in various cases dealing with "reasonable prices", as in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and *Connally* v. *General Construction Co.*, 269 U. S. 385. In other cases it has been found possible to uphold the validity of the statute by restrictive interpretation as in *Fox* v. *Washington*, 236 U. S. 273, and *Screws* v. *United States*, 325 U. S. 91.

This Court has indicated in the *Gilliland* case that the statute here involved falls within the second group rather than the first. Clearly the statute cannot apply, without any limitations, to all false statements concerning matters within the jurisdiction of governmental departments and agencies. To punish all such statements under all circumstances would not only run afoul of the First Amendment (see *Winters* v. *New York*, 333 U. S. 507) but would involve the same difficulty with which this Court was confronted in the *Screws* case because of the ever widening scope of federal power dependent upon decisions of this Court. It has therefore been generally recognized that the statute does not apply where the deception is not practiced upon the particular agency charged with the administration of the law, and thus having juridiction in the sense

POOR COPY

BLEED THROUGH

of power to deal with the matter. In *United States* v. *White*, 69 F. Supp. 562, the Court held that there could be no prosecution for a statement made to a state police officer which concealed the fact that defendant was transporting aliens illegally in the country. In *United States* v. *Crittenden*, 24 F. Supp. 84, the court held that a false statement made in connection with a state accounting by a veteran's guardian could not be punished. See also *Terry* v. *United States*, 131 F. 2d 40 (C. C. A. 8, 1942); cf. *United States* v. *Sanders*, 42 F. Supp. 436 (D. C. S. D. Texas 1941).[14*]

Nothing which the government urged in its opposition to the application for the writ of certiorari meets the issue which petitioner has raised. The first contention there made (pp. 19, 21) results from a misunderstanding of petitioner's contention. This is not merely that the indictment is insufficient or that the statement was unsworn and not transcribed. It is that the statute itself cannot be constitutionally applied to punish false statements uttered by petitioner under all the circumstances shown in the trial of Counts X and XI because, as those circumstances show, petitioner was held merely to a general requirement to be truthful on official matters or matters within the jurisdiction of the United States, with no requirement in laws, rules or regulations which would have enjoined and adequately defined his obligation to make statements and provided suitable notice of consequences. The *Zavola* and *Spivey* cases, *supra*,

---

[14*]From this point of view, petitioner's statements were not in a matter within the jurisdiction of the Department, since the only power to require such statements was conditioned on the observance of regulations which had not been followed. In this respect, Panuch was in no different position from the State Police Officer in the *White* case, *supra*, and petitioner's position was as much that of a volunteer as the position of the accused in the *Hamner* case, *supra*.

cited by the government, are wholly different from the case at bar because in each of them there was an applicable law or regulation which met the criteria of the *Gilliland* case.

The government further suggests that in applying the statute to the facts of this case, it has not sought to prosecute for "casual" statements, claiming that Panuch regarded the matter "seriously" and testified that "the conference was in the nature of an appeal, the man was appearing before me as Deputy Assistant Secretary and he was entitled to have his day in court" (Brief in Opposition to Petition, pp. 21, 23).

Panuch's characterization of the interview was not communicated to petitioner at the time but was reserved for testimony at the trial (R. 52). This after-the-event characterization cannot formalize what was never formal. An appeal would have been held pursuant to some law or regulation. It might have been appropriate in connection with removal charges. It could have no application to the situation which then confronted the parties, namely, a request for a resignation. Panuch, who is an attorney (R. 58) must have known that this was not an appeal. Moreover, it is apparent that he did not regard the matter seriously enough to find out about or have before him a record of the prior proceedings, or to advise petitioner of the charges in advance, although a month elapsed between the request for the resignation and the interview, the date and place of which was fixed by Panuch (R. 48); to have other State Department officials or even a stenographer present; to advise petitioner of his rights; or otherwise to afford petitioner what a lawyer would normally regard as the requirements of "a day in court", if he was serious about the matter.[15] That

[15]See, *United States* v. *Lovett*, 328 U. S. 303, 317-318 (1946) *In Re Oliver*, 92 L. ed. 492, 500 (1948).

POOR COPY

BLEED THROUGH

petitioner was "capable" of knowing that Panuch's inquiries related to a matter within the jurisdiction of the Department (Brief in Opposition to Petition, p. 24) is no substitute for the fact that petitioner was not, as was his right placed under an adequately described duty, with suitable notice that his statements, if false, were punishable under the statute. If Panuch, had wished to lay a foundation for the possible invocation of criminal sanctions for false statements, he could have done so by resort to the appropriate law or regulations which required the making of statements on this matter. His failure to act in accordance with law should not result in the unconstitutional application of the False Claims Act.

We submit that there is no basis in the statute for the attempted distinction made by the government between "casual" and "serious" conversations. There is likewise no basis for the construction adopted by the court below holding that the statements were properly punishable because the interview was "official".[16] Such unwarranted constructions make a palimpsest of the statute. Neither "official" nor "serious" meets the test of constitutional definiteness. Neither is a substitute for the criteria of obligation, definition and notice which are required to provide an ascertainable standard of guilt. On the other hand, if prosecution is limited to situations where a duty, direct or conditional, is imposed by some other law which meets the criteria applied in the *Gilliland* case, and in aid of which

---

[16]Cf. "Official: 2. Of or pertaining to an office, position or trust 3. Holding an office or serving in a public position; authorized to perform a service 4. Prescribed or recognized as authorized; 5. Befitting to, or characteristic of, a person in office or a person when acting in this official capacity; formal." "Websters New International Dictionary Second Edition Unabridged.

the False Claims Act is invoked, the constitutional requirements are satisfied.

The key words of the statute are "in any matter within the jurisdiction of any agency or department of the United States". Standing alone, unlimited by any law, rule or regulation, or applied under circumstances which do not enjoin the duty or adequately define it, with suitable notice of consequences, they attempt to cover so much that they effectively cover nothing. The record shows that the statute was so applied in the trial of Counts X and XI herein, thereby depriving petitioner of his rights under the Fifth and Sixth Amendments to the Constitution. We submit the judgment below should be reversed and the case dismissed.

If this Court does not agree with the foregoing, our contention, in the alternative, is that the judgment below should be reversed and the case be remanded for a new trial on counts X and XI for the reasons set forth in Points II and III below.

Point II

PETITIONER WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION AND HIS RIGHTS WERE SUBSTANTIALLY PREJUDICED BY HAVING BEEN INDICTED, TRIED, CONVICTED AND SENTENCED FOR ELEVEN VIOLATIONS WHEN ONLY TWO VIOLATIONS OF THE FALSE CLAIMS ACT COULD VALIDLY HAVE BEEN INVOLVED.

Petitioner before trial moved to dismiss the first nine counts of the indictment as barred by the statute of limitations (R. 20). The trial court denied this motion (R. 20,

POOR COPY

BLEED THROUGH

26-30). Petitioner renewed the motion, at the close of the government's case (R. 31), in a motion for judgment of acquittal (R. 31) and in a motion for new trial (R.46). The trial court also denied these motions (R. 31, 33, 47). The case was tried and submitted on all eleven counts (R. 36-43); the jury returned a verdict of guilty on each count (R. 45-46); and the trial court sentenced petitioner generally to one to three years imprisonment on all eleven counts (R. 47).

The court below properly held that "the first nine counts of this indictment were barred by the statute of limitations and defendant's motion that they be dismissed should have been granted" (R. 276). "(The) trial . . . could validly involve only the last two counts . . . It was error to permit the first nine counts to remain in the indictment and to go to the jury" (R. 277).

The court below held, however, that petitioner was not prejudiced by this error because the statements alleged to have been false in the barred counts were the same as or similar to the statements involved in the two counts properly on trial, no evidence was improperly admitted by reason of the erroneous inclusion of the barred counts upon the trial, and, therefore, the issue actually submitted to the jury was actually and in fact the same as it would have been if only the last two counts had been submitted (R. 278).

In so holding, we submit, the court below is wrong in fact and in law and has ignored the following prejudicial errors, each of which separately considered, was substantially prejudicial, and all of which, taken in their cumulative and total effect, constituted such massive prejudicial error, so clear a denial of due process and a fair trial, as fully to warrant reversal and a new trial.

A. Prejudicial Error in the Inclusion as Issues on the Trial and the Submission to the Jury of the First Nine Counts of the Indictment.

The error of the trial court in denying petitioner's motions to dismiss the first nine counts of the indictment permitted the prosecuting attorney in his opening statement (App. 3-5) to summarize at length and the trial court in its instructions to the jury to quote in full all the allegations of the first nine counts, (R. 36-40) and to direct the jury to bring in a verdict on all counts, including these nine (R. 36). A copy of the indictment was submitted to the jury for its deliberation. (R. 45)

The submission to the jury of these nine barred counts constituted prejudicial error. These counts did not charge a continuing offense or one arising out of the same transaction with the offenses charged in the last two counts. On the contrary, each count of the indictment charged each false statement as a complete and separate offense; each count required proof of a false statement which the other counts did not; and each false statement, if timely, was separately punishable under the statute. (R. 22. *Ebeling* v. *Morgan,* 237 U. S. 625, 628-631 (1915); *Blockburger* v. *United States,* 284 U. S. 229, 301-304 (1932); see *Gavieres* v. *United States,* 220 U. S. 338 (1911)). The first nine counts, however, were erroneously submitted to the jury, as timely. As thus submitted, these counts constituted nine separate formal accusations of crime, which gave shape, force and authority to the evidence directed to those counts at the trial, particularly with respect to the allegations as to falsity, and carried with them the sting and opprobrium of criminality. See 3 Wigmore on Evidence (3rd ed. 1940) Section 980 (a) and cases and authorities there cited. If

POOR COPY

BLEED THROUGH

the trial had been limited to the last two counts, it would have been prejudicial error, under well established decisions, to permit any evidence, on the government's case in chief, or by cross examination of petitioner, as to the indictment on the nine prior counts.[17] Here, the submission of these counts to the jury was even more prejudicial than if those nine counts had been introduced in evidence, because, while evidence is subject to rebuttal or explanation, the fact of the indictment on the nine barred counts as submitted, was irrebuttable. Petitioner was thus prohibited from showing that no conviction had been or could then lawfully be obtained on those counts of the indictment, (R. 36) and that he was entitled to a judgment on the ground of the statute of limitations which was no less a protection to him than a judgment on the ground of innocence. (*United States* v. *Oppenheimer,* 242 U. S. 85, 87 (1916).)

The inclusion of the nine counts as issues on the trial was equally prejudicial error, within the principle of those decisions which hold that improper joinder of counts in an indictment constitutes grounds for reversal.[18]

---

[17]*Thomas* v. *United States,* 121 F. 2d 905, 907 (App. D. C. 1941); *Sanford* v. *United States,* 98 F. 2d 325, 327 (App. D. C. 1938) (citing cases); *Coulston* v. *United States,* 51 F. 2d 178, 182 (C. C. A. 10th 1931); *Thompson* v. *United States,* 30 App. D. C. 352, 359, 360 (1908); *Coyne* v. *United States,* 246 Fed. 120 (C. C. A. 5th 1917); 3 Wigmore on Evidence (3rd ed. 1940) Section 980 (a).

[18]*Bass* v. *United States,* 20 App. D. C. 232 (1902); *McElroy* v. *United States,* 164 U. S. 76 (1896); *De Luca* v. *United States,* 299 F. 741, 743 (C. C. A. 2, 1924); *Beaux Art Dresses* v. *United States,* 9 F. 2d 531, 533 (C. C. A. 2, 1925) cert. denied 270 U. S. 644 (sub nom. *Todd* v. *United States*); *Zedd* v. *United States,* 11 F. 2d 96 (C. C. A. 4, 1926); *Castellini* v. *United States,* 64 F. 2d 636 (C. C. A. 6, 1933); See *Williams* v. *United States,* 168 U. S. 382, 391 (1897); *Pointer* v. *United States,* 151 U. S. 396, 400 (1894).

"In cases of felony the multiplication of distinct charges has been considered so objectionable, as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise, that it is the settled rule in England and in many of our states to confine the indictment to one distinct offense or restrict the evidence to one transaction. . . . Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action having been properly objected to, is revisable on error. . . . And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts." *McElroy* v. *United States,* 164 U. S. 76, 80 (1896).

Here, petitioner was indicted, tried, and convicted for nine separate offenses for which he was not validly on trial and which arose in different transactions from those involved in the last two counts. Concededly, it was error to join the first nine counts with the last two. By such joinder, petitioner was prejudiced in being held out to be habitually criminal, and was deprived of substantial rights. As pointed out more fully below, the issues involved in the trial of the first nine counts were separate and distinct from those involved in the last two counts; and important evidence, relevant only to prove that petitioner had knowingly and wilfully made false statements, as charged in the nine barred counts, was admitted at the trial, although irrelevant to any of the issues in the last two counts, except for the prohibited purpose of proving petitioner's disposition to commit other similar and different crimes

POOR COPY

BLEED THROUGH

(See Point II B and C, *infra*). The resulting confusion of issues, we submit, constituted prejudicial error in the trial of the last two counts.

The first ground, relied upon by the court below, to support its contrary conclusion is that the statements alleged to have been false in the barred counts are the same as or similar to those in the two timely counts.

In fact and in law, however, the statements alleged to have been false in the two sets of counts are not the same.

Each count of the indictment consists of three pertinent parts: the statement alleged to have been false; the allegation or allegations as to the falsity of such statement; and the allegation as to knowledge and wilfulness. The court below has isolated the statements alleged to have been false from the remaining allegations in each count and has then erroneously posited an identity between such statements by considering only their subject matter in abstraction from the differing circumstances alleged as to each statement.

Counts X and XI allege that petitioner in 1946 knowingly and wilfully made false and fraudulent statements to a representative of the State Department that he had never been a member of the Communist Party and had never used the alias Tony Whales. The allegations as to falsity are that petitioner was such a member and did use the alias in the Party in 1940 and 1941 (R. 16-19).

The subject matter of seven of the statements alleged to have been false in the first nine counts is the same as (Counts I, V, VI, and VIII) or similar to (Counts II, III and V) the subject matter of the statements alleged to have been false in Counts X and XI (R. 2-19). In all other respects, however, the statements in the two sets

of counts are indisputably different. They are different with respect to time, as the court below has recognized, by holding the first nine counts barred by the statute of limitations. They are different with respect to the governmental agencies involved and the circumstances under which they were made, as the indictment itself shows (see Point I *supra*). They are different, in Counts VII and IX, relating to petitioner's denial of opposition to conscription, with respect to subject matter. Most important of all, in this connection, five of the statements alleged to have been false in the first nine counts are different from those alleged to have been false in Counts X and XI with respect to the allegations as to their falsity (see Counts II, III, IV, VII, and IX).

These latter five counts contain thirty-nine or more allegations as to falsity which are entirely lacking in Counts X and XI. Thus, Counts VII and IX (R. 12, 15) charge that petitioner falsely denied in 1942 and again in 1943 to representatives of the Civil Service Commission that he had ever made any speeches against conscription. Each of these counts contains the same two allegations as to falsity. The first such allegation merely alleges, without any reference to membership or the use of an alias in the Communist Party, that petitioner did in fact speak at various public meetings advocating peace mobilization and urging listeners to bring pressure upon Congressmen and Senators to defeat legislation for military conscription. The second alleges that petitioner advocated similar matters at Communist Party meetings to Communist Party members. The statements alleged to have been false and the first allegation as to falsity in each of these counts raise only the issue as to whether petitioner had falsely denied that

POOR COPY

BLEED THROUGH

he had opposed conscription and are in no way comprehended within any of the allegations of the last two counts. With respect to the issue thus framed, petitioner could have been convicted under Counts VII and IX, wholly apart from any issue as to membership or alias, raised by the last two counts.

Again, Counts III and IV (R, 5, 7) charge petitioner with having falsely stated in 1942 to a representative of the F. B. I. that he had never contributed any services to or participated in the activities of the Communist Party. These statements are alleged in each count to have been false in the same eleven separate respects. Among such allegations of falsity are charges that petitioner counselled and advised Communist Party members and recruits "with respect to methods to be employed in infiltrating divers groups and societies for the purpose of creating Communist Front Organizations" (Counts III (e) and IV (e); "to sow resentment and discontent among Negroes by agitating the question of racial discrimination, to the end that members for said Party might be thus recruited" (Counts III (h) and IV (h); "concerning a plan, policy and program of said Party having for its purpose (1) disintegration of the morale of the Military Forces of the United States; (2) teaching the principles of Communism to men in said Military Forces; and (3) recruiting members for the Communist Party for the ranks of said Military Forces to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist System." (Counts III (k) and IV (k). (R. 6-9, 36-38, App. 10-11).

These are charges of crimes under other federal and state laws and of misconduct, which in its effect upon

the jury is as prejudicial as the charge of other crimes. (See p. 54, *infra.*)

If the trial had been limited to the last two counts of the indictment, none of the statements charged as false in the first nine counts and none of the additional allegations therein as to their falsity would have been included in the indictment or submitted to the jury as criminal charges on which petitioner had been indicted. These charges, as well as all the others in the first nine counts are so highly prejudicial and defamatory that they constitute civil libel *per se*, as placing the accused "beyond the pale of respectability and making him a symbol of public hatred". See *Spanel* v. *Pegler*, 160 F. 2d 619, 622 (C. C. A. 7th, 1947, citing cases); *Mencher* v. *Chesley*, 61 N. Y. S. 2d 147 (1947); the refusal of a witness before a Grand Jury to answer such charges in the form of questions will be sustained on the basis of the privilege against self incrimination. See, *In re Costello* (D. C. D. C. June 27, 1947, unreported). Here, the trial courts instructed the jury to bring in a verdict on all the counts of the indictment, quoting verbatim all the prejudicial and inflammatory matters contained in the first nine counts (R. 36-39, 43).

If it is prejudicial and reversible error for the trial court to submit to the jury charges involving the "small dishonesties of trade" without calling the attention of the jury to the fact of such abandonment (*Nash* v. *United States*, 229 U. S. 373, 379-380 (1912)), it is infinitely more prejudicial for the trial court, as it did here, to submit to the jury highly inflammatory and prejudicial matters which were not only abandoned in part[19] but were totally barred, under instructions to consider it all.

---

[19]In the *Nash* case, *supra*, two counts alleging conspiracies to restrain and monopolize trade, each containing the same twelve

POOR COPY

BLEED THROUGH

Such charges are not only inadmissible as hearsay, unproved, extraneous and prejudicial matter, which improperly rebuts the presumption of innocence accorded the accused and are thus assumed to be prejudicial without more,[20] but their inclusion as issues in this case may reasonably be taken to have had a substantially prejudicial effect on the trial of the issues in the only two counts which were held valid. If those two counts had been tried alone, the issue would have been whether petitioner's statements denying that he was a member of the Communist Party and had used the alias were true or false, and, if false, knowingly and wilfully made, without reference to the other nine counts of the indictment or the issues included therein. In

---

allegations as to means, were submitted to the jury under instructions which permitted the jury to consider all the means and permitted a verdict on any of them. This Court reversed for the failure to instruct the jury that some of the means had been abandoned.

Here, Counts III and IV alleging false statements with respect to contribution of services to and participation in the activities of the Communist Party, each containing the same eleven allegations as to falsity, were submitted to the jury under instructions which invited the jury to consider all the allegations of falsity, which were quoted in full, and permitted a verdict on any of them (R. 36-38, 43). The government contended in the court below and has not denied in this court that two of these allegations as to falsity ((e) and (h) of Counts III and IV) were abandoned (See Petition p. 25, Reply Brief for Petitioner on Petition p. 9, Brief for Appellee in the court below, p. 37). The jury was not instructed as to the fact of such abandonment.

The *Nash* case is significant here, first, because the court below has assimilated the first nine counts to the last two, and thus, even if correct, has sustained the verdict on the last two counts, although two of the included counts were abandoned in part, without instructions as to the fact of such abandonment; and, second, because the submission of counts which have been abandoned is no less prejudicial than the submission of counts which are barred.

[20]See cases cited in footnote 17 *supra*.

the actual trial of eleven counts, this relatively simple issue was confused and prejudiced by the addition of further and unrelated issues under the barred counts as to whether petitioner had committed nine other crimes by making nine other false statements on three previous occasions, to representatives of two other governmental agencies under different circumstances, in two instances on a different subject matter, and with respect to different, additional and highly prejudicial allegations as to falsity, some of which involved additional crimes under other statutes.

The court below, however, has failed to consider or attach any weight to the distinction between the actual trial, where all the nine counts were permitted to remain in the indictment and to go to the jury, as actual issues on the trial, with all their sting of criminality still undrawn, under the erroneous ruling of the trial court with respect to those counts,[21] and a trial in which only two counts are involved, under a correct adjudication as to the nine counts, where the indictment on the nine prior counts and the additional issues included would not be before the jury, or the jury would be instructed to disregard such accusations, as having already been adjudicated on the merits. *United States* v. *Oppenheimer, supra.* The prejudicial effect of the trial court's erroneous ruling is further considered below in connection with the admission of evidence under the nine barred

---

[21]Where the issue involves the constitutional privilege against self-incrimination, it is settled law that before the statute of limitations under which a witness can be prosecuted for a crime has run, he may plead the privilege; after it has passed, he cannot plead the privilege because there is no longer any danger to him. *Hale* v. *Henkel,* 201 U. S. 43, 57 (1906); *Brown* v. *Walker,* 161 U. S. 591, 598 (1896); in re *Doyle,* 42 F. 2d 686, 690 (D. C. S. D. N. Y. 1930; rev'd per curiam without opinion 47 F 2d 1086 C. C. A. 2nd 1931).

POOR COPY

BLEED THROUGH

counts. It is sufficient here to point out that the court below, having asserted an identity or similarity in the statements alleged to have been false in the two sets of counts, which in fact and in law does not exist, has erroneously concluded that the issues in the actual trial of eleven counts were the same as they would be in a hypothetical trial of the last two counts. On these mistaken premises, the court below has permitted the first nine counts, on which no conviction had been or could then lawfully be obtained, to be put before the jury, and included as issues in the trial of the last two counts, to the prejudice of petitioner, without justification in policy or citation in precedent and contrary to applicable decisions. This, we submit, constitutes prejudicial error.

B. Prejudicial Error in the Admission of Evidence of Other Different Crimes.

The court below held that no prejudicial error was committed in the admission of evidence by reason of the inclusion of the barred counts upon the trial, because all the evidence actually introduced would have been admissible in a trial limited to the last two counts. (R. 277) This holding, we submit, is erroneous.

1. The principal government witness, Drew, a police spy and *agent provacateur*, (See Point III B *infra*), testified that in October 1940, at one of a series of Communist Party meetings which he attended with petitioner, petitioner, identified as "defendant Tony", made a speech advocating that "now the young men in the Communist Party must get into the Army, so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights and teaching them

Communism. In this way we could soon overthrow the capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was especially assigned to young men of conscription age." (R. 104) Drew also testified that, on another occasion, in April, 1941, petitioner had spoken to a meeting sponsored by the National Negro Congress, stating that "we outnumbered the number of Communists in Russia during 1917 when the revolution took place. He said that now was the time for revolution, that the Communists could have a revolution in this country." (R. 116)

This evidence was admitted to prove the allegations as to falsity under barred Counts III (k) and IV (k). (R. 7, 9). The court below held generally that petitioner's speeches were consistent with the policies of the Communist Party and would, therefore, have been admissible upon the disputed issue of membership in the Party, under Count X, in a trial limited to the last two counts. (R. 277).

There is no evidence whatsoever in this record as to any advocacy by the Communist Party of any of the above acts.[22]

---

[22]The nearest approach to such evidence is the testimony of Hewitt, to which exception was duly taken, who stated that in 1930 he went to Russia as a member of the Communist Party and remained there for about two years, during which time he attended the International Lenin School, to become indoctrinated with the definite purpose of learning espionage; to become professional revolutionists; to learn theory that would ultimately lead to the overthrow of the United States government (R. 255). Hewitt admitted on cross examination to having committeed perjury in his application for passport in 1930 and application for renewal of passport in 1932 in connection with this trip (R. 117-120, 129-139). There is no evidence in this record that the Communist Party then or in 1940 or 1941 advocated the immediate overthrow of the United States government, the infiltration of the armed forces, or the use of the Army to overthrow the capitalists.

POOR COPY

BLEED THROUGH

Nor has proof of such advocacy by the Communist Party been judicially established. *Bridges* v. *Wixon*, 326 U. S. 135 (1945); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Kessler* v. *Strecker*, 307 U. S. 22, 30 (1938); *Ex Parte Fierstein*, 41 F. 2d 53 (C. C. A. 9th, 1930); Prettyman J. dissenting opinion in *N. M. U.* v. *Herzog*, 78 F. Supp. 146, 177, 183-5 (citing cases) D. C. D. C. (1948). Moreover, the trial court charged the jury that the question of whether or not the Communist Party advocated any such acts was not material to the case. "Nor, might I add, is the Communist Party on trial here. We are not concerned with the virtues or vices of the Communist Party." (R. 42). The quoted evidence as to petitioner's advocacy of such acts, therefore, does not establish his membership in the Communist Party.[23]

That evidence, however, does tend to establish that petitioner had committed other separate, independent crimes under the New York Criminal Anarchy Act, the Seditious Conspiracy Act and the Alien Registration Act, 1940 (Appendix p. 2). Consequently, it was relevant, if at all, only to prove his disposition or propensity to commit crimes generally and, therefore, to commit the crimes with which he was validly charged in the indictment.

It has long been established that evidence of other separate crimes, not charged in the indictment and relevant only to show disposition to commit crimes, is inadmissible against

---

[23]The court's argument here imputes petitioner's advocacy to the Communist Party, and on the basis of such advocacy by the Communist Party, imputes membership in the Party to petitioner. Such a reverse attempt to establish guilt by association runs contrary to the doctrine of the *Schneiderman*, *Bridges* and related cases. See Gellhorn Report on a Report of the House Committee on Un-American Activities 60 Harv. L. Rev. 1193, 1217-1218.

the accused; or stating the point differently, evidence of such other crimes is generally inadmissible, unless relevant to prove purpose or intent, or some other essential element of the crime charged,[24] and where such evidence is admissible, the jury must be instructed as to the limited purpose for which it may consider such evidence.[25]

The evidence in question is not admissible in accordance with either formulation of this principle. The False Claims Act is a statute in which specific purpose or intent is not an essential element. Its legislative history shows that purpose and intent to defraud which were essential ingredients in the statute prior to 1934 were deliberately and intentionally eliminated by amendment in that year and the statute now punishes false statements regardless of such purpose or intent. *United States* v. *Gilliland*, 312 U. S. 86 (1940). In any event, the trial court failed altogether to instruct the jury as to the limited purpose for which it could consider the evidence. That court, having denied petitioner's motion to dismiss the first nine counts and having admitted the evidence of such other crimes under the allega-

---

[24] *Boyd* v. *United States*, 142 U. S. 454 (1891); *Hall* v. *United States*, 150 U. S. 76 (1893); *Boyer* v. *United States*, 132 F. 2d 12, 13 (App. D. C. 1942); *Coulston* v. *United States*, 51 F. 2d 178, 180-181 (C. C. A. 10, 1931) (citing cases); *Kempe* v. *United States*, 151 F 2d 680 (C. C. A. 8, 1945); *United States* v. *Modern Reed and Rattan Co.*, 159 F. 2d 658 (C. C. A. 2, 1947) cert. denied 331, U. S. 831; cf. Stone The Rule of Exclusion of Similar Fact Evidence, America 51 Harv. L. Rev. 988, 1007 1 Wigmore on Evidence (3rd ed. 1940) Section 194; 2 ibid Section 305; 1 Wharton Criminal Evidence (11th ed. 1935) Section 343.

[25] *Boyd* v. *United States*, 142 U. S. 454, 457-458 (1891); *Orloff* v. *United States*, 153 F. 2d 292 C. C. A. 6 (1946); *Peo.* v. *Fultz*, 109 Calif. 258, 41 Pac. 1040; *Hanley* v. *State*, 28 Tex. App. 375, 13 S. W. 142; 1 Wharton, Criminal Evidence (11th ed. 1935) Section 365.

POOR COPY

BLEED THROUGH

tions of those counts was in no position to give such a charge and, in fact, instructed the jury to the contrary (R. 36, 43). Under the trial court's ruling as to the first nine counts, petitioner was likewise precluded from requesting such a charge, although by appropriate motions, his exception to the ruling and the instructions were preserved (R. 31, 33, 46).

The evidence of the prohibited advocacy was not offered on the cross examination of petitioner but as a part of the government's case in chief to establish the allegations of the barred counts, particularly Counts III (k) and IV (k). Even if it were relevant to show petitioner's character, it would be inadmissible under the rule which prohibits the prosecution from initially attacking petitioner's character, and, in any event, from doing so by resort to particular acts of misconduct. *McKreth* v. *United States,* 103 F. 2d 495, 496 (C. C. A. 5, 1939); *Railton* v. *United States,* 127 F. 2d 691 (C. C. A. 5, 1942); 1 Wigmore on Evid. (3rd ed. 1940), Sections 57, 192, 194. If it had been offered on cross-examination, it would not have been relevant on any of the issues under the last two counts, or if relevant, its probative value would have been so slight and incidental as to be outweighed by the hostility, prejudice and confusion of issues which it created.

The fact that petitioner had advocated revolution now to a meeting sponsored by the National Negro Congress and had thereby committed a crime wholly separate from those charged in the last two counts of the indictment throws no light on the issue as to whether he had ever been a member of the Communist Party, or used the alias; whether he had denied to Panuch that he had ever been such a member or used the alias; or whether his statement to Panuch, if false, was wilfully and knowingly made. Nor

does the fact that petitioner, identified as "defendant Tony", at a Communist Party meeting had called upon young men in the Communist Party to infiltrate the armed forces, disintegrate their morale, take control of the Army and overthrow the capitalists tend to throw any light on whether that petitioner denied membership, or the alias to Panuch or whether his denial, if false, was knowing and wilful. It does, however, tend to prove petitioner's membership, if not the use of the alias,[26] by virtue of his attendance at the meeting, and perhaps by the ambiguous use of the word "we" in Drew's report of petitioner's speeches. But the prejudice to petitioner in permitting the additional testimony of other crimes so far outweighs the probative value of such evidence of membership as equally to constitute prejudicial error. This is particularly true, since such evidence of membership was wholly cumulative (cf. R. 94, 96-97, 98-99, 100-104, 105-122), the purpose of the additional testimony as to other crimes was to establish the allegations of falsity under counts which should not have been permitted to remain in the indictment or to go to the jury and the jury was not, and, under the erroneous ruling of the trial court, could not have been given precautionary instructions appropriate to its consideration of the proof of such other crimes.

---

[26]Petitioner was concededly known as "Tony" because of his Italian origin and so testified before the Board of Appeals and Review of the Civil Service Commission (R. 249-250) and at the trial (R. 196). See Panuch's testimony as to petitioner's statements as to the use of the name "Tony" (R. 50). He is not charged with having falsely denied that he had ever used or was known by the name "Tony" and his identification, in this testimony, as "Tony" does not prove that he had ever used the name or been known as "Tony Whales" or that he had falsely denied having used or been known as "Tony Whales".

POOR COPY

BLEED THROUGH

If such testimony is to be defended, it must be on the theory that the testimony as to petitioner's prohibited advocacy was a part of a continuous story, which as a whole was admissible and, if it chanced, as it did, to disclose separate crimes, that did not make it inadmissible; in short, that if the evidence is relevant to prove one crime, it does not become inadmissible because it also proves another. *United States* v. *Krulewich*, 145 F 2d 76, 80 (C. C. A. 2d (1944)). It is on this theory that the government undertakes to defend the admissibility of this evidence and cites the *Krulewich* case as its authority (Brief in Opposition to Petition, p. 25, ftn. 12).

But in that case, which involves a prosecution for transporting a woman in interstate commerce for the purpose of prostitution, under the White Slave Traffic Act, the court held that the admission of evidence of the separate crime of rape as a part of the continuous story of a government witness constituted reversible error, although purpose and intent were essential elements of the crime and the trial court carefully instructed the jury as to the use to which it might put such evidence.[27]. The grounds for reversal were that even if the evidence of rape were admissible as a part of a continuous story and to prove intent or purpose, "it was at a cost more than commensurate with the dangers it involved; it greatly tended to muddle the jury and to lead them to convict the accused because he was in general so loathesome."[28]

So in this case, even if the evidence as to petitioner's advocacy of revolution now or of the infiltration of the Army by young Communists for the purpose of using the

---

[27] *United States* v. *Krulewich*, 145 F. 2d 76, 81.
[28] *United States* v. *Krulewich*, 145 F. 2d 80.

Army to overthrow the capitalists was a part of a continuous story which incidentally tended to show petitioner's membership in the Communist Party, although there is no proof that the Communist Party itself advocated any such acts, and although there is no specific intent in issue to which such evidence could be deemed relevant, the danger in the admission of such evidence was greater than its relevance and tended to muddle the jury and lead them to convict petitioner because he was in general an advocate of dangerous, prohibited and repugnant views.

2. Similar considerations apply to the admission of evidence that petitioner had counselled Communist Party members to infiltrate organizations for the purpose of creating Communist front organizations and to sow resentment and discontent among Negroes by agitating questions of racial discrimination in order to recruit Party members, admitted under Counts III(e) and (h) and IV(e) and (h). (R. 5-9, App. 10-11, R. 36-37). The government contends that no such testimony appears in the record. (See ftn. 19 *supra*.) It is obvious, however, from the evidence which does appear in the record, (R. 74-78, 106-107, 112, 113, 115-117, 187) as shaped by the counts of the indictment (R. 5-9) the opening statement of the prosecution (App. 10-11), and the recitation of these counts by the trial court in his instructions to the jury (R. 36-37), that the jury could reasonably have believed that petitioner had done exactly what he was charged with having done, particularly since the trial court did not instruct the jury that the allegations of the counts, to which such evidence appears to have directed, had been abandoned. In its effect upon the jury such evidence is as prejudicial as the proof of other crimes and clearly falls within the reason for the rule prohibiting such proof, as prejudicial error.

POOR COPY

BLEED THROUGH

3. There was other evidence of different crimes admitted in evidence, to which the court below did not advert.

Thus, Panuch testified for the government, on direct examination, that one of the charges which he discussed with petitioner on June 1, 1946 was that in 1940 and 1941 "you had made a false statement with respect to your financial resources to get a job with WPA and that statement was under oath" (R. 49). To this charge, Panuch reported petitioner as having replied "Sure, I said that I didn't have any money and that I was without financial resources, to get the job, because I felt that I was competent to do the job and whether or not I had money or not was not an ethical matter of consequence" (R. 50).

Earlier, in its case in chief, the government had introduced (App. 25), Government Exhibit No. 22, a transcript of the investigation of petitioner conducted by representatives of the Civil Service Commission on November 23, 1942, containing petitioner's statements alleged to have been false under Counts V, VI, and VII (App. 26-47). Also included in this exhibit was a statement by the Civil Service interrogator that the Commission had received evidence that when petitioner and his wife had applied for relief, they had both stated to the Department of Welfare of New York City as a reason for obtaining relief, that petitioner's wife's father and mother had died prior to 1936 and they were, therefore, unable to obtain help from anyone in their immediate family (App. 33). Petitioner is reported in this exhibit as having replied that the statement was made, possibly by petitioner, but in all probability by his wife, that the statement was false in that his wife's parents were alive, and that he had in fact lived with his wife's parents five months prior to going on relief; but that petitioner was not

prepared to argue the ethical problem involved (App. 29, 33-37). On cross-examination, petitioner was asked whether he had lived with his wife's parents after 1936 (App. 64-65), whether they were now alive and in comfortable circumstances, and whether during 1939 he was visited by welfare agents of New York City, when petitioner and his wife were present and a conversation was had concerning the date and place of death of his wife's parents, to all of which he replied, over objection, in the affirmative (App. 70-71). The admitted purpose of the questions was to prove that petitioner had made false statements to welfare agents in New York in 1939, in connection with an application for relief (App. 65-72). Petitioner's objections to these questions were overruled (App. 64, 66-67, 70, 71) and his motions for mistrial (R. 31) and for new trial (R. 46) based on the admission of this evidence were denied.

Other evidence was introduced, over objections, through Panuch and Government Exhibit 22 with reference to the charge made by Panuch that petitioner's wife in 1940-1941 was a member of the Communist Party and petitioner's reported denial of the charge (R. 49-50, App. 38). On cross examination, petitioner testified, that his wife had been a member of the Communist Party (R. 231). Petitioner's objections to the admission of this evidence were overruled (R. 231, App. 126) and his motions for a mistrial and new trial, based on the admission of this evidence were denied (R. 31, 46).

None of these accusations of false statements were charged as crimes under any part of any of the counts of the indictment; all were first introduced as a part of the government's case in chief principally in connection with

POOR COPY

BLEED THROUGH

the admission of the proof under the first nine counts, before petitioner had put his character in issue, and were, in any event, a resort to particular acts of misconduct to prove petitioner's bad character (App. 72)[29]; and all tended to prove other crimes of perjury (R. 49) or false statements, at other times, on different subjects, to representatives of other governmental agencies, federal and local, from those charged in the last two counts. They were not relevant in the trial of those two counts, except to prove petitioner's disposition to commit similar crimes. Their admission was, therefore, prejudicial error.[30]

C. Prejudicial Error in the Admission of Evidence of Other Similar Crimes.

In substance, petitioner's nine statements to the F. B. I. and the Civil Service Commission in 1942-1943 admitted under the barred counts were the same as (Counts I, V, VI, and VIII), similar to (Counts II, III, and IV) and different from (Counts VII and IX) petitioner's statements to Panuch in 1946, admitted under Counts X and XI. (Tr. 116, 118-120, R. 244-245; Tr. App. 26, 44, R. 247-249; Tr. 323, R. 249-250; R. 49-50). In other respects, as we have pointed out, the statements are wholly different from each other (Point II A *supra*). Nevertheless, the court below held that all such statements were the same or similar, that the evidence that petitioner had made these statements in 1942-1943 would have been admissible in a trial limited to the last two counts, and that no prejudicial error resulted from the admission of those statements at the trial. (R. 277-278).

---

[29]See p. 23, *supra*.

[30]See cases cited in note 24 *supra*.

The court below based this conclusion on the ground that

> "If the defendant had been on trial for only his two 1946 statements, the issue would have been the truth or falsity of those statements. . . . Evidence that he had been a member and used the alias in 1940-1941 was thus clearly admissible. *That admissibility could not be nullified by the mere fact that he made the same statements in 1942* (Under Counts I, V, VI and VIII). *And we do not see that evidence that he had made the same statements in 1942 was prejudicial to him upon a trial as to the 1946 statements; in fact, it would appear to have been beneficial, in that it showed that he had consistently from a time close to the event maintained the same position. . . . That he denied in 1942* (with respect to Counts II, III, IV, VII and IX), *as he did in 1946, that he had ever done any of those things* (*attended meetings of the Communist Party, contributed services to it, participated in many of its activities, and made speeches consistent with its policies*) *does not seem to us prejudicial to him upon a trial of the issue whether he had or had not ever been a member of the Communist party. Here again his undeviating consistency of position would seem to have been beneficial rather than prejudicial* (R. 277, italics supplied).

The court below thus held that the evidence of the 1942-1943 statements was not only admissible but beneficial to petitioner.

The government seeks to support this argument primarily on the latter ground. It assumes, *arguendo*, that evidence of petitioner's 1942-1943 statements would not have been admissible, but justifies their admission as harmless if not beneficial (Brief in Opposition to Petition, p. 26).

1. The first difficulty with this argument, on the question of admissibility, is that even if the substance of the

POOR COPY
BLEED THROUGH

1942-1943 statements is the same as that of the 1946 statements, the crimes established by their admission in evidence, under the indictment and the trial court's instructions, are undisputably different from those established by admission in evidence of the statements under the last two counts (R. 25-26). *Ebeling* v. *Morgan*, 237 U. S. 625 (1915); *Blockburger* v. *United States*, 284 U. S. 299, 301-304 (1932). For this reason, the trial court, having refused to dismiss the indictment on the ground that it charged the same offense in a multiplicity of counts, denied petitioner's motion before verdict to compel the government to elect, instructed the jury to return a verdict as to each and every count, and sentenced petitioner on all eleven counts (R. 22, 26, 31, 33, and 36). If the court below is correct, the trial court was wrong, and its error in these respects is reversible.[31]

2. The second difficulty with the argument on admissibility is that the crimes established by the admission of the first nine statements as submitted were not only separate, but collateral and independent offenses, in relation to the crimes established under the last two counts alone. The first nine statements were made three and four years earlier than the last two, to other representatives of different government agencies, under different circumstances, and in two instances, on a different subject matter. Moreover, the nine earlier statements were made at a time when petitioner had just begun to work for the government, at the early stage of the war, before the Civil Service Commission had rated him eligible for continued government employment, before peti-

---

[31] *Braverman* v. *United States*, 317 U. S. 49 (1942); *Cain* v. *United States*, 19 F. 2d 472, 476 (C. C. A. 8, 1927); *Patrilo* v. *United States*, 7 F. 2d 804 (C. C. A. 8, 1925). See *Kotteakos* v. *United States*, 328 U. S. 752 (1946).

tioner had been inducted into the Army and when petitioner was desirous of further government employment. The last two statements were made after the war was over, after petitioner had been honorably discharged from the Army, long after he had been rated eligible and when he no longer desired further government employment but wished to resign for the purpose of entering private employment as a producer of films for labor unions, although unwilling to resign under fire (R. 178, 180-181, 59-63, 200-201; App. 58-60).

At the trial, the nine earlier statements were admitted to prove that petitioner had lied on nine prior occasions, and had thereby committed nine separate and independent crimes. In relation to the last counts alone, the only relevance of the nine earlier statements as actually submitted was to show petitioner's criminal disposition to lie and to commit similar offenses.

The admissibility of the evidence as submitted may be tested by asking to what else, other than disposition, it had relevance in the trial of the last two counts. The nine statements were clearly irrelevant to show that the last two statements were false or fraudulent. Denial of membership and of the use of the alias, however often repeated, does not tend to show the fact of membership or the use of the alias. They were equally irrelevant to show that petitioner made the last two statements. The making of certain statements in 1942 and 1943 does not show the making of any statements in 1946. They were also irrelevant to show that the last two statements were made with any specific intent. As we have already pointed out, the statute makes false statements criminal regardless of specific intent, and no such issue was involved in the trial of the last two counts. *United States* v. *Gilliland, supra.*

POOR COPY

BLEED THROUGH

Were the nine statements relevant to the issue of general intent or knowledge and wilfulness, which was involved in the trial of the last two counts? Although the trial court did not instruct the jury as to the meaning of knowledge or wilfulness, it did define "feloniously" as meaning "with criminal intent or with intent to commit the crime charged in the statute" (R. 41). To this extent, the quesion of general intent and thus of knowledge and wilfulness, was defined as an issue to the jury. (See *United States* v. *Goldsmith*, 137 F 2d 393, 394 (C. C. A. 2, 1943), cert. denied 309 U. S. 678; *United States* v. *Center Veal and Beef Co.*, 162 F 2d 766, 772 (C. C. A. 2, 1947); *United States* v. *J. Greenbaum and Sons, Inc.*, 123 F 2d 770, 773 (C. C. A. 2, 1941)). But the fact that intent is in issue is not enough to let in evidence of similar offenses unless they are so connected with the offense charged in point of time and circumstances as to throw light upon the intent. *Boyer* v. *United States*, 132 F 2d 12, 13 (App. D. C. 1942). Here, as we have pointed out, the nine statements to the F. B. I. and the Civil Service Commission in 1942-1943 were unconnected in point of time and circumstances with the two statements in Panuch in 1946.[32] Petitioner's intent to commit the crime charged in the statute, or his knowledge and wilfulness, were no more apparent from his earlier statements than they were from his last two statements. Nor

[32]Petitioner's 1942-1943 statements admitted under Counts VII and IX denying that he had made speeches against conscription do not establish that he denied membership and the alias to Panuch in 1946; has no logical tendency to prove that his 1946 statements were false or fraudulent, unless opposition to conscription tends to prove membership in the Communist Party; and throws no light on whether, if his 1946 statements were false, they were made wilfully, knowingly or with intent to commit the crime charged in the statute.

is this a case of peculiar coincidence in which mere recurrence throws light on mental states.[33]. Though the repeated passing of counterfeit money tends to show knowledge of its character, the repeated passing of money does not tend to show that it is counterfeit. And, in the present case, the fact that petitioner had made certain statements to the F. B. I. and the Civil Service Commission in 1942 and 1943 throws no light whatever on the question of whether those statements were false, whether he knew them to be false, or whether he intended to commit the crime charged in the statute when he made them again to Panuch in 1946. The nine statements are, therefore, irrelevant to any of the issues involved in the trial of the last two counts.

Considered wholly apart from the context of the actual trial, no one of these statements in itself would be prejudicial in the trial of the last two counts. Considered in that context, however, including the indictment as a whole, the opening statement of the prosecution, the nature of the government's case in chief, the purpose and effect of the introduction of the nine statements in evidence, and the trial court's instructions, these nine statements constitute the *sine qua non* of the proof of nine separate similar crimes, whose only relevance, in relation to the trial of the last two counts alone, was to show petitioner's disposition to commit crimes.

Boyer v. *United States,* 132 F. 2d 12, (App. D. C. 1942) is directly in point. There, the accused was convicted under false pretense indictments for having sold warehouse receipts representing whiskey to two witnesses by means of fraudulent representations that he was a representative of a certain distillery and that the receipts would

[33]Cf. 2 Wigmore on Evidence (3rd ed. 1940) Section 302ff.

POOR COPY

BLEED THROUGH

double in value in two years. The false pretenses statute involved requires the specific intent to defraud as an essential element of the crime. The government called a third witness, Littlepage, who testified that about two years before the acts for which the accused was on trial, the accused had sold this third witness similar warehouse receipts and had made to her the same representations which he was charged with having made to the complaining witnesses. This testimony was offered, over objection, and admitted on the theory that it showed the intent to defraud. The Court of Appeals reversed the conviction, because of admission of this testimony, despite the fact that the trial court, upon reflection, instructed the jury to disregard it. Even though the specific intent to defraud was in issue and the evidence was offered specifically to show that intent, the court held that the fact that the accused "had made a certain statement to Littlepage throws no light whatever on the question whether it was false or whether he knew it to be false, or whether he intended to defraud when he made the same statement to (the two complaining witnesses)" (ibid. 13). It held, moreover, that the testimony in question, in the circumstances of the case, established proof of other crimes, irrelevant except to show disposition to commit similar crimes, and that the prejudicial error in its admission was too great to be cured even by the trial court's instruction to the jury to disregard it.

> "No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise and confusion of issues is thought to outweigh its probative value. The law seeks 'a convenient bal-

ance between the necessity of obtaining proof and the danger of unfair prejudice."[8] The alleged fact that a man committed one forgery clearly increases the likelihood that he committed another forgery, but testimony to the earlier crime is not, for that reason alone, admissible.[9] We think the Littlepage testimony is within that principle."

"[8]Note (1931) 29 Mich. L. Review 473, 480."

"[9]*Laughlin* v. *United States*, 67 App. D. C. 355, 92 F 2d 506, cf. *Witters* v. *United States*, 70 App. D. C. 316, 106 F 2d 837, 125 A. L. R. 1031."

In the case at bar, the prejudicial error in the admission of the first nine statements in relation to the last two counts alone is even greater than the admission of the earlier statements in relation to the later statements on trial in the *Boyer* case. Here, the evidence of the earlier statements was not admitted dehors the indictment but under nine counts which specifically charged such statements as crimes; the prosecution did not offer such statements on the issue of specific intent which is not, in any event, a constituent element of the crime charged by the statute here involved, but as a part of its case in chief to prove the nine crimes charged in the indictment; and the trial court did not instruct the jury to disregard the first nine statements but on the contrary misdirected the jury to consider such statements with respect to each and every one of the counts.

The misconception which led the court below to hold the first nine statements relevant and not prejudicially erroneous arose, we suggest, because of its failure to distinguish between the statements as submitted in the context of the actual trial and the harmless effect which they would have had in a hypothetical trial, abstracted from the

POOR COPY
BLEED THROUGH

context and limited to the last two counts, where, if offered by petitioner they might have been relevant to corroborate the statements involved in the last two counts.

3. But even if, as actually submitted, the nine statements could be construed as relevant to any of the issues in the trial of the last two counts alone, and would have been admissible to prove the crimes validly on trial, although they also proved others, their admission in the circumstances of this case was nevertheless prejudicial error.

Petitioner was entitled to correct instructions that he was on trial for two crimes, not eleven. *A fortiori*, he was entitled to precautionary instructions that the evidence of other crimes was admissible only on the issue in the trial of the last two counts to which it was relevant.[34] Such instructions would have avoided the danger that the jury would convict petitioner of the crimes charged in the last two counts, merely because it believed him guilty of the nine crimes for which he was not validly on trial. But such instructions were not, and under the trial court's erroneous ruling with respect to the first nine counts, could not have been given or requested. Instead, the trial court misdirected the jury to consider all of the evidence, including the first nine statements, with specific reference to the first nine counts of the indictment, and with all the opprobrium attaching to such evidence by reason of the indictment and misdirection. The first nine statements were, therefore, not submitted as mere statements, devoid of criminality, as they might have been, if, under a correct ruling, the trial had been limited to the last two counts and petitioner had offered such statements on his own behalf to show his

---

[34] *Orloff* v. *United States, supra; Boyd* v. *United States, supra;* 1 Wharton Criminal Evidence (11th ed. 1935) Section 365.

consistency of position. Nor were they submitted as bearing only on some essential element of the crimes charged in the last two counts, as they should have been, under precautionary instruction, if the trial had been limited to those two counts alone. Under the trial court's erroneous instruction, they were submitted, without limitation, as the *sine qua non* of the government's case in chief as evidence of nine separate offenses, for which, as it turned out, petitioner was not validly on trial. Where evidence of similar offenses is admissible, the failure of the trial court, upon request, to instruct the jury as to the limited purpose for which it may consider such evidence is prejudicial error. *Orloff* v. *United States, supra.*

Here, where such an instruction could not have been given or requested, and where the erroneous instructions as given permitted the jury to convict petitioner of crimes for which he was not validly on trial, the error is no less prejudicial

4. Under the decisions, such an error is presumed on principle and for reasons of policy to be prejudicial. Here, the error was aggravated by the difference between the nature and circumstance of the statements under the two sets of counts.

Under the trial court's erroneous instructions, the jury must necessarily have been prejudicially influenced in reaching its verdict on the oral, informal and unsworn statements admitted under the last two counts, especially on the issue of knowledge and wilfulness, by the evidence of the documented, formal and sworn statements, admitted under the nine barred counts, particularly in the light of the opening statement for the prosecution, the array of witnesses who were summoned to identify the proof of the nine earlier

POOR COPY

BLEED THROUGH

statements, and the submission to the jury of the indictment itself, in full, during its deliberations. Under these circumstances, the inference is fairly compelled that with the evidence of the 1942-43 statements before it, the jury concluded that petitioner, having lied on nine previous occasions under oath was a chronic, consistent and criminal liar on this very subject, as well as others, and, *therefore*, knowingly, wilfully and criminally lied in his unsworn statements to Panuch in 1946. The question is not whether the jury was right in its verdict, regardless of the error in the admission or submission of the 1942-1943 statements, but rather what effect those errors had or may be reasonably taken to have had upon the verdict, the test being the impact of the error, not of the appellate court, but of the jurors in the total setting. *Kotteakos* v. *United States, supra.* Here, the error in the admission of evidence of other similar crimes, irrelevant except to prove disposition, was compounded by the erroneous instructions to consider that evidence, without limitation, on the issues in the trial of all eleven counts.

That such errors were prejudicial is not logically excluded by the argument of the court below that the first nine statements are the same in substance as the last two statements. Whether or not they are the same, the jury was required by the instructions to believe that each statement constituted an indispensable part of the proof of separate offenses, and, in that belief, must necessarily have reached the conclusion, if it believed the evidence, that petitioner had, in fact, uttered nine separate lies and had thereby committed nine separate crimes, before it reached the question of whether he had uttered other lies and committed other crimes under the last two counts. To hold otherwise is wholly to ignore the effect of the erroneous instruction.

Nor is the fact that prejudicial error was committed logically excluded by the corollary argument of the court below that "the only issue was the truth or falsity of the statements . . . if (the statements) were false in 1946, they were false in 1942, and vice versa" (R. 278). The actual issue submitted at the trial was not merely whether the 1946 statements were true or false, but whether those statements, together with nine others, were true or false, and, if false, knowingly, wilfully and feloniously made (R. 43). Had the trial been limited to the last two counts, the jury could reasonably have found that the two 1946 statements were false, but not knowingly and wilfully made, particularly in the light of the informal circumstances of their making, whereas, at the actual trial of eleven counts, the jury may well have concluded that since petitioner had criminally lied under oath nine times before in 1942 and 1943, for that reason alone, he knowingly and wilfully lied twice afterwards in his sworn statements to Panuch. The admission of evidence of the earlier crimes is prejudicially erroneous, not because it had no appreciable probative value on the issue of knowledge and wilfulness, but because it had too much, not because it had no relevance at all, but because it was relevant only to disposition. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge". 1 Wigmore on Evidence (3rd ed. 1940) Section 194. In the total setting of the actual trial, the error may reasonably be taken to have led the jury to a verdict of guilty on all eleven counts, whereas had the trial been on the last two

POOR COPY
BLEED THROUGH

counts alone, absent these errors, there is a reasonable possibility that the verdict would on these counts have been not guilty. The difference is between (1) the logical necessity that the jury must have reached the same verdict on two counts as it did on eleven, which the court assumes from the asserted identity of the two sets of statements and the proof of their falsity and (2) the impact on the minds of the jury of the nine prior sworn and formal statements, as submitted, in context, when it came to its deliberations as to the later informal and unsworn statements. The logical necessity is apparent only in abstraction; the reality lies in the impact of the error on the minds of the jury.

5. The argument of the court below, and the supporting argument of the government (Brief in Opposition to Petition, p. 26) that the evidence of petitioner's 1942-1943 statements was beneficial to petitioner is, we submit, sheer sophistry. The argument assumes either that unalloyed advantages accrued to petitioner from his nine earlier statements, or that the jury weighed only his last two statements against the proof of his activities in 1940-1941, without reference to the fact that it had already found him guilty of nine separate crimes, in the making of his nine earlier statements. These assumptions, like those relating to the admissibility of the evidence, do violence to the reality by abstracting the last two counts from the total setting of the trial. The nine earlier, sworn, formal and documented statements *were* considered by the jury and must necessarily have had a prejudicial effect in leading the jury to believe petitioner's general disposition to lie and thus his knowledge and wilfulness in the making of the unsworn, informal and unrecorded statements in the last two counts. If the first nine statements proved any consistency of position, the actual circumstances of the trial, they proved peti-

tioner's consistent disposition to lie and commit crimes. The unalloyed advantages to petitioner in such proof are not visible.

D. Petitioner Was Erroneously Sentenced.

The court below upheld the general sentence of one to three years' imprisonment imposed by the trial court on the jury's separate verdict as to each of the eleven counts of the indictment, on the ground of the rule in *Claasen's* case, that in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only[35] (R. 281). The record here, however, shows that the trial court thought that each of the eleven counts charged a separate, distinct and valid offense (R. 25). The trial court, therefore, must necessarily have imposed its general sentence on the basis of eleven separate convictions, as found by the jury, not on the basis of the only two which could validly have been found. In *Claasen's* case, the court mentions the fact that "the record does not show that any of the instructions at the trial were excepted to." Here, the record shows that petitioner moved to dismiss the first nine counts of the indictment before, during and after trial and excepted to the trial court's denial of motions which led to the erroneous submission of all eleven counts to the jury for verdict (R. 20, 31, 33, 46). Under these circumstances, the rule in *Claasen's* case is not applicable, *Dwyer* v. *United States,* 170 Fed. 160, 166 (C. C. A. 9, 1909), especially where, as here, because of misjoinder or other unfairness at the trial, it is mere conjecture to say that the court was not influenced by the addi-

---

[35] *Claasen* v. *United States,* 142 U. S. 146 (1891).

POOR COPY
BLEED THROUGH

tional verdicts, *Fulton* v. *United States,* 45 App. D. C. 27, 42 (1916) see *C. M. Spring Drug Co.* v. *United States,* 12 F. 2d 852, 859, 861 (C. C. A. 8, 1926). On the record, it cannot be determined what part of the sentence is attributable to the verdict on the barred counts, the remaining two counts, or any of the counts separately. It cannot, however, be fairly assumed that the trial court would have imposed the same penalty for two violations of the applicable statute as for eleven separate violations which included those two. The rule in *Claasen's* case was designed to avoid a miscarriage of justice. Its arbitrary application in this case succeeds only in achieving the opposite result.

The government contends that the decision of this court in *Pinkerton* v. *United States,* 328 U. S. 640, 641-642 (1946) forecloses the argument (Brief in Opposition to Petition, p. 27). In that case, however, there was nothing in the record, as there is here, to rebut the presumption; indeed it appears that the question was never presented.[36] The government further suggests that petitioner's remedy is provided by Rule 35 of the Federal Rules of Criminal Procedure permitting application to the trial court for a reduction in sentence, within sixty days after the mandate is handed down (ibid. 27). The Rule, however, is addressed to the discretion of the trial court and does not foreclose the assertion of a right. If the general sentence on eleven counts was error, this court may correct the error or remand the case, under instructions, for resentencing. *Yasui* v. *United States,* 320 U. S. 115 (1943); *Husty* v. *United*

---

[36]In its brief on the writ, in the *Pinkerton* case, in this Court, the government stated as to this point "The question is not argued either in the petition or in petitioner's brief on the merits" (pp. 10-11).

States, 282 U. S. 694 (1931); *Dwyer* v. *United States, supra; C. M. Spring Drug Co.* v. *United States, supra; Fulton* v. *United States, supra;* see *Braverman* v. *United States*, 317 U. S. 49 (1942).[37]

E. Conclusion.

The trial court's error in denying the motion to dismiss the first nine counts of the indictment permeated the entire trial. It permitted the prosecuting attorney in his opening statement and the trial court in its instructions to put before the jury, as additional and different issues on the trial, accusations of crimes which were barred, and numerous allegations of prejudicial matter which should never have been included in the indictment. It led to the improper admission of evidence of nine separate crimes under the False Claims Act, of other irrelevant crimes under other federal and state laws, and of other prejudicial matter in the nature of crimes, which prejudicially affected the verdict. It prevented petitioner from objecting to the admission of evidence and from requesting precautionary instructions. It permitted the jury to find petitioner guilty of nine crimes for which he was not validly and led the trial court to misdirect the jury and to impose an erroneous sentence based on counts, which should not have been submitted.

In the total setting of this case, these errors cannot be dismissed as harmless. The evidence against petitioner is not so strong or overwhelming that any reasonable jury, had there been no error, could not have reached a different

---

[37]Under Revised Title 18 U. S. C., Section 1001, effective September 1, 1948 (based on Title 18 U. S. C. 1940 ed. Section 80), the maximum punishment has been reduced from ten to five years "to harmonize the punishment provisions of comparable sections involving offenses of the gravity of felonies, but not of such heinous character as to warrant a 10-year punishment" (Reviser's Notes Section 287.)

POOR COPY

verdict. Of the three chief witnesses for the prosecution, one was a self-confessed perjuror (R. 117-120, 129-139), the second a former member of the Communist Party, whose testimony was in conflict in material respects (R. 70, 71, 78, 127-128) with that of the third witness, a police spy and *agent provocateur* (R. 88-89), whose testimony is subject to serious reservations as to its reliability, cf. *Colyer* v. *Skeffington*, 265 Fed. 17, 69 (D. C. Mass. (1920)). Petitioner did not admit his guilt but took the stand to deny it vigorously in every material respect. Under these circumstances, we submit, the permeating error of the trial court substantially and prejudicially affected the verdict. *Kotteakos* v. *United States, supra.*

Point III

THE COURT BELOW ERRED IN SUSTAINING THE JUDGMENT ON COUNTS X AND XI, BECAUSE OF THE APPLICATION BY THE TRIAL COURT OF A UNIQUE STANDARD FOR THE ADMISSION OF EVIDENCE RELATING TO NEGROES AND A NEGRO ORGANIZATION, BASED ON THE SUPPOSED SUSCEPTIBILITY TO PREJUDICE OF THE PREDOMINANTLY NEGRO JURY IN THE CASE, CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES, AND IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS AND AN IMPARTIAL TRIAL BEFORE A REPRESENTATIVE JURY, UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

Petitioner contended in the court below that the trial court improperly excluded admissible and important evidence relating to Negroes and the National Negro Congress, because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury.

It is clear that such a test, if, in fact, applied, would violate petitioner's rights under the Fifth and Sixth Amendments to the Constitution. For some seventy years, this Court has held in a variety of circumstances that the systematic exclusion of Negroes from grand and petit juries solely on the ground of race or color constitutes a denial of constitutional rights to the accused. *Patton* v. *Mississippi*, 332 U. S. 463 (1947) and cases there cited. For similar reasons, this Court has condemned the systematic exclusion of wage-earners, see *Thiel* v. *Southern P. Co.*, 328 U. S. 217 (1946), and women, see *Ballard* v. *United States*, 329 U. S. 187 (1946) from jury lists. It follows, inescapably, we think, from this Court's insistence that the constitutional guarantees require the selection of a representative jury, without exclusion because of race, color, economic status or sex, that, once properly selected, the jury must be treated, throughout the trial, as a representative jury.

In the court below, the government conceded that the application of such a test for the admissibility of evidence would violate petitioner's constitutional rights[88] but contended—and was sustained therein by the court below—that such a test was not applied and, in any event, the rulings complained of were correct.

The issue presented requires an analysis of the evidence which was offered and excluded, the rulings of the trial court with respect to such evidence and the justification advanced in support of those rulings.

---

[88]"All this is merely to say that a court must not permit racial make-up, economic status or sex of the jury to govern or affect its rulings on the admission or rejection of evidence. With the proposition so stated, the government could take no issue" (Brief for Appellee p. 61).

POOR COPY

BLEED THROUGH

A. The Exclusion of Evidence Relating to Policy Brutality Against Negroes.

The ruling which, although not the most important in its exclusion of evidence, most clearly illuminates the basis upon which the trial court withheld evidence from the predominantly Negro jury, involved the limitation of petitioner's direct examination with reference to the subject matter of a meeting at his home, which was offered to rebut the testimony of Harper as to that meeting. Harper, a Negro, testified for the government that he attended a Communist meeting at petitioner's home, where petitioner was present, in May 1941, when representatives of the National Negro Congress met with representatives of the Communist Party in that area to see what could be done to increase the growth of the Congress and iron out its difficulties. Without interruption from the trial court, Harper testified that the difficulties of the Congress had arisen because some of its members resented the presence of whites at their meetings and attempts at Communist Party members to recruit people at such meetings who were interested in the question of rents, places to live, jobs, "questions of attempts to stop indiscriminate brutalities that were being carried on against them in particular". In answer to the question as to whether petitioner had participated in this meeting as a representative of the Communist Party or of the National Negro Congress, Harper was permitted to testify over objections that the answer called for and resulted in a conclusion, that "he operated as a representative of the Communist Party, so far as we know" (R. 76-78, 82).

On his own direct examination, petitioner attempted to rebut Harper's version of the meeting. He had begun to testify that he had met Harper at petitioner's home with

others present in middle or late 1940 and that he particularly recalled the date because of a then current incident involving the beating up of two Negroes by police from a scout car, which was the subject matter of the discussion of those present (R. 185-186). At this point, without objection from the government, the trial court interrupted, halted the examination on the ground that "we are not interested in that" and that it could have "other purposes".

Summoning counsel to the bench, the trial court stated that "This will lead right up to an attempted prejudice", that petitioner "very significantly makes use of those things" and that "the prejudice has happened here". Counsel for petitioner offered to prove that "Harper has said that at that time there was a meeting at defendant's home, which was a Communist Party meeting. We intend to show first that it was not any such thing and second what it was." Counsel for the government, however, argued that there could be no fair trial before *this* jury if you go into the beatings (R. 188 italics supplied) and at a later point, announced the government's intention to move for a mistrial, if the testimony persisted. The trial court, after repeated expressions of a desire "to go to the jury without prejudicial bias, sympathy or hatred or any feeling for or against" requested petitioner's counsel to proceed from the point of interruption without making futher reference to the incident of police brutality and to approach the bench before going into similar matters in the future (R. 186-189).

Under these limitations, petitioner was allowed to testify in the most general terms, and under specific admonitions from his counsel not to mention the incident, that a certain incident had occurred in the neighborhood, that he advised those present to have the witnesses to the incident draw up

POOR COPY

a letter to the Police Commissioner about it, that the meeting was not a Communist Party meeting, that nothing about Communism was mentioned and that nothing other than what petitioner had described in a general way took place (R. 189-190).

We submit that the testimony which the trial court refused to allow under these circumstances was relevant, competent and material to the case. It related to the only meeting at petitioner's home to which Harper had testified (R. 82). Harper had testified that the subject matter of the meeting was the role of the Communist Party and the National Negro Congress. Petitioner was prevented by the ruling of the trial court from testifying affirmatively as to what was actually said and done by Harper, petitioner and others on a different subject matter and was required to testify negatively, in conclusions, and in "a general way".

The court below, without a specific ruling, apparently concluded that this limitation on petitioner's direct examination was justified first because the trial court was seeking to prevent further outbursts by petitioner, similar to those which he had previously made and which the trial court had stricken with reference to the F. B. I. and the State Department (R. 177-178, 56-57, 186-187), and second, because, in the resumed examination, although counsel for petitioner protested the ruling, the trial court said "All right" and the examination proceeded without interruption (R. 190, 279). Petitioner's so-called outbursts, however, related to a wholly different matter. Since the testimony which petitioner sought to give in his version of the meeting would have served to contradict Harper's version of the meeting, such testimony should have been permitted, even if other unrelated testimony was properly stricken. Moreover, it is not

to be supposed that in giving the answer "All right", when counsel for petitioner protested the limitation in his resumed examination before the jury, the trial court was undoing, in two non-committal words, what it had been at pains explicitly to prohibit when it had summoned counsel to the bench. The limitation cannot be justified on the ground that petitioner's counsel followed it under protest.

The government in the court below sought to justify the ruling on the ground that Harper was testifying about one meeting in May 1941 and petitioner about another in middle or late 1940 and that petitioner's testimony could not serve to contradict Harper's (Brief for Appellee, p. 49). But, the record is clear that the only meeting at the home of petitioner to which Harper testified and the only meeting with petitioner which he described as a Communist meeting was the meeting here in question (R. 75-76, 82, App. 60-61).[39] There was thus on Harper's own testimony only one meeting involved and petitioner's proffered and excluded testimony was in direct conflict on a material issue in the case with that given by Harper with respect to that meeting. To

---

[39]The government conceded that "Harper testified concerning but one meeting at the home of defendant", but argued that "at no place in the record was Harper specifically asked, nor did he state that he had been *in* defendant's home but once" (Brief for Appellee, p. 50, ftn. 18). Harper, in fact, testified on cross examination:

> Q. And you have visited him (Marzani) at his home, haven't you?
>
> A. I went to a meeting there.
>
> Q. You visited his home. You went to his home, didn't you?
>
> A. To a meeting, yes (R. 82).

The only testimony by petitioner as to any meeting with Harper at petitioner's home is the meeting here in question (R. 190-191).

POOR COPY

BLEED THROUGH

hold otherwise would be to say that Harper's testimony as to the date of the meeting was conclusive and that petitioner was not entitled to contradict it. The limitation on petitioner's testimony was, therefore, error.

B. Limitation on the Cross Examination of Drew, as to His Activities as an Agent-Provocateur.

The second and most important series of ruling involved the trial court's limitation of the cross examination of Drew, with respect to his role as a police spy and *agent-provocateur* in the National Negro Congress.

Drew testified on his direct examination that about a year after he had passed his recruit examination and had become a member of the New York Police force, he was selected as an undercover agent for a unit of its Undercover squad (R. 88). This squad was originally organized shortly after the outbreak of World War II to investigate various organizations in New York City which had been designated by the Police Department as subversive (R. 64-65). The unit to which Drew was attached was under the supervision of Captain Gallagher and consisted of some thirty young police officers, male and female, especially selected because of their varying backgrounds, after "a thorough loyalty check", to investigate particular "subversive" organizations. Drew was selected because he was a Negro (R. 166). He was assigned to and did investigate the Communist Party and in that connection a local branch of the National Negro Congress (R. 64-66, 70). With other members of the squad, he was instructed by Captain Gallagher to infiltrate himself into such subversive organizations, "advance themselves in those organizations by working as closely as they could with the people in those organizations and to try to

capture such jobs as secretary of the organization which would give them access to the lists of members' names and letters, and to provide them with the best opportunity for making notes of the activities of the organizations" (R. 66), and to make daily reports on such matters to the Police Department (R. 90). Under the instructions of Captain Gallagher, Drew's operations, like those of the other members of the squad, were conducted with the greatest secrecy and strictly under cover. He moved away from his home in Long Island to a room in Harlem, assumed the alias Bill Easley, and posed as a railway clerk employed by the Board of Transportation. For this purpose he was furnished with the necessary false identification papers and his identity was concealed from his family, his friends and other members of the Police Department. He made nightly written reports to and received his weekly paychecks from a separate headquarters in the downtown business district, ostensibly operating as an advertising agency, later a merchandise surveying firm, run by Captain Gallagher who was known as Martin Pearson, the head of the firm (R. 89).

Drew's first assignment in July 1940 was in Harlem. In this assignment he failed completely. "No results at all" (R. 89). He then transferred his activities to the East Side. His testimony about his activities there in 1940-1941 in the Communist Party, and in local branch of the National Negro Congress, in relation to petitioner, furnished the principal evidence that petitioner's statements under all eleven counts of the indictment were false. This testimony involved some twenty-six meetings with petitioner, twenty-three of which were described as having taken place at Communist Party headquarters, or as under Communist auspices, or otherwise as Communist meetings. Except for two of these meetings about which Harper testified, only one

POOR COPY
BLEED THROUGH

of which was asserted to be a Communist meeting, Drew's testimony is uncorroborated.[40]

Included in Drew's direct testimony, describing petitioner's relationship to the Communist Party, were incidental references to Drew's activities in connection with the East Side Branch of the National Negro Congress. He testified that, at Communist Party headquarters, he had "explained to (petitioner) *the work I was doing in organizing the National Negro Congress. I explained how I had gotten the aid of several Negroes that had been Communist Party members and we were doing a very good job of getting the Congress started on the (East) side* (R. 106, italics supplied); that he had been chairman or master of ceremonies at a dance sponsored by the National Negro Congress of the East Side (R. 111) and on another occasion had been one of the principal speakers at an open meeting of the Congress at a church where Congress literature had been distributed and a collection had been taken up (R. 115); that he had made frequent detailed reports to and had sought guidance from Communist Party officials on the membership, aims, prospectus and literature of the Congress (R. 112, 113) *". . . the organization of which I was head"* (R. 112, italics supplied); that with petitioner he had composed a leaflet for the Congress about discrimination (R. 113); that he had met with members of the Congress and the local executive committee of the Communist Party to consider the reasons for the downfall of the Congress on the East Side and how to rebuild it without the visible aid of the Communist Party (R. 117); that he had

[40]See Government Brief in Opposition to Petition pp. 8-16 enumerating the meetings. Hewitt's testimony that he met petitioner on two occasions (R. 257-258, 260-261) does not corroborate Drew's testimony, since Drew did not testify as to such occasions, although Hewitt said Drew was present at one of them.

suggested that Harper as a member of the Congress be the representative of the Congress in another organization, and Harper was so selected (R. 121); and that he had made nightly reports to the Police Department, at its separate headquarters, as to all these activities. The record incidentally indicates that these reports included the names of those present at such meetings (R. 90-91, see Note R. 97, 115-117, App. 61).

During the course of his direct examination, Drew testified as to his personal history and schooling (R. 87-88), and later as to a conversation with petitioner in which Drew stated how he happened to join the Communist Party. "I told him that being a Negro, southern born, I was against discrimination and so forth and that I wanted to help my people, as well as all minorities . . . 'the only people I could turn to were the Communists', that I was interested and wanted to be with them" (R. 105).

On cross examination, petitioner began to question Drew about these activities and Drew's role in the local branch of the National Negro Congress. The questioning had brought out that Drew had organized the branch with the help of others around September 1940 and had solicited members for it (R. 123), when, without objection by the government, the trial court halted the examination, requested counsel to approach the bench, and asked the purpose of the examination.

Mr. Ford. . . . (Drew) testified on the stand yesterday that after giving his history and his schooling, this witness on direct, he said he always had his people——

The Court (interposing). Who, this witness?

Mr. Ford. Yes, sir.

The Court. I don't recall that.

POOR COPY
BLEED THROUGH

Mr. Kelley. And I don't recall that either.

Mr. Ford. Well, it is on that basis that I am saying that. I may be wrong.

The Court. Yes, that isn't my recollection.

Mr. Ford. But because I believe that will show that——

The Court (interposing). I will deny that part of it at this time, sir.

Mr. Ford. Yes sir. And if the record turns out that I am correct, had I been permitted, I would have developed that he did the following things:

First, *because of the testimony of the captain who organized the squad who said that the National Negro Congress was one of the organizations that he delegated them to investigate—I am going to show that he created, this witness, that organization, that he had people other than Communists come and address the association; that the people he solicited were colored people and other nationalities;* and

Secondly, again as to the meeting he testified of the National Colored Congress being held in that church and he described all of its details and what was stated by each. *I want to develop all those phases of it under the heading of National Negro Congress.*

The Court. I will not hear you on anything of that sort save those meetings where he specifically attended sir, and where Mr. Marzani was in attendance.

Mr. Ford. That is your Honor's ruling?

The Court. Yes.

Mr. Ford. May I have an exception on on this limitation of cross examination (R. 124-125, italics supplied).

Pursuant to this ruling, the trial court subsequently refused to permit counsel for the petitioner to ask Drew whether or not he had previously testified that he was al-

ways out to help his people, colored people (R. 126). The trial court again stated his erroneous view that Drew had not so testified (R. 126).

Counsel for petitioner further stated that he desired to cross examine Drew on matters which the government had put into this case which went beyond the issue of whether petitioner's statements were made wilfully and falsely, and also for the purpose of questioning Drew's credibility. The trial court ruled that, as to matters outside the issues, petitioner would be permitted to go into anything brought out on any of those occasions, as to which there is testimony, but as to credibility, "I will not go into that. I will permit you to go into and attack his credibility as to anything he has dealt with on those particular occasions" (R. 125). No further questions relating to these matters were thereafter permitted (R. 128-129).

These rulings may be summarized as follows:

1. Cross examination of Drew as to his role in the National Negro Congress would be permitted only as to meetings about which Drew had testified and where both Drew and petitioner were in attendance.

2. Cross examination of Drew was forbidden as to his testimony, given as a reason for joining the Communist Party, that he wanted to help the Negro people, even to the extent of refusing to permit the preliminary inquiry, required as a basis of contradiction, as to whether he had so testified.

3. Cross examination of Drew for the purpose of attacking his credibility would be forbidden, unless limited to particular occasions about which he had testified on direct examination.

POOR COPY

4. Cross examination as to matters not directly related to the issues would be limited to occasions as to which Drew had testified on direct examination.

These rulings are prejudicially erroneous because they improperly limited petitioner's right of cross examination on vital issues in the case.

"A full cross examination of a witness upon the subjects of his examination in chief is the absolute right not the mere privilege of the party against whom he is called and a denial of this right is a prejudicial and fatal error. It is only after the right has been fully and fairly exercised that the allowance of cross examination becomes discretionary." *Heard* v. *United States,* 255 F. 829, 832 citing cases (C. C. A. 8, 1919); *Alford* v. *United States,* 282 U. S. 687, 691 (1931).

"Cross examination . . . is necessarily exploratory; and the rule that the cross examiner must indicate the purpose of his inquiry does not in general apply . . . It is the essence of a fair trial that reasonable latitude be given the cross examiner even though he is unable to state to the court what facts a reasonable cross examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to the test, without which the jury cannot fairly appraise them." *Alford* v. *United States,* 282 U. S. 687, 692.

In the light of these applicable principles, petitioner is entitled to all the inferences as to the sufficiency and scope of his proposed cross examination which may fairly be drawn from his offer of proof and from Drew's direct testimony to which it related. *McCandless* v. *United States,* 298 U. S. 342, 346 (1936). The proposed inquiry related to subject

matter of Drew's direct examination; it was necessarily exploratory; and the trial court interrupted it, to require a statement of purpose, which was given, in part specifically, and in part generally, although such a statement of purpose is not generally required. The offer was objected to on the grounds of materiality, not of sufficiency, and, "if it had been . . . suggested that the offer was incomplete, it is not unfair, when we consider the nature of the specific matters named, to assume that the evidence in respect of them could have been supplied". *McCandless* v. *United States, supra.*

Consideration of the issue will be facilitated, therefore, by restating petitioner's offer in the detail which could have been supplied, had its sufficiency been questioned, and by examining the rulings of the trial court, in the light of the applicable principles cited above.

Accordingly, the first object of the proposed cross examination was to show, with reference to the subject matter of the direct examination, that Drew had been instructed by Captain Gallagher to infiltrate an existing branch of the National Negro Congress which had been designated as subversive by the Police Department and to report on the names of its members and activities; that, having failed to find any such subversive organization in existence in Harlem or on the East Side, Drew had created one, become the head of it, chaired its meetings, solicited members for it, written pamphlets to induce others to take action in accordance with its aims, sought and obtained the help of the Communist Party for it, spread its influence by placing its representatives in another organization and sought to resuscitate it when it met its downfall; that he had simultaneously reported its members and activities to the Police Department, and that by such misconduct, he had exceeded his authority and acted as an *agent provocateur.*

POOR COPY

The trial court, however, refused to permit a cross examination of Drew upon these subjects of his direct examination, unless the cross examination was subject to the three-fold limitation that it relate to meetings about which Drew had testified, where Drew specifically attended and where petitioner was in attendance (R. 125). Even under the narrowest form of the Federal rule respecting the scope of cross examination, these limitations are without justification in applicable decisions. "A party has . . . (the) right to cross examine any witness . . . as to facts and circumstances connected with the matters stated in his direct examination." *Philadelphia T. R. Co.* v. *Stimpson,* 14 Pet. 448, 461, 10 L. Ed. 535. "The right of cross examination is not confined to the specific details of the direct examination, but extends to the subject matter inquired about." *Dewitt* v. *Skinner,* 232 F. 443 (C. C. A. 8, 1916); *Heard* v. *United States,* 255 F. 829, 832, 834 (C. C. A. 8, 1919) and cases there cited. Wigmore on Evidence (3rd ed. 1940), Sections 1885-1887, 1890.

Under this three-fold limitation, petitioner was denied the right to a full cross examination of Drew along these lines because, although all of the subjects involved were included in Drew's direct examination, many of them did not occur at meetings or on occasions when both Drew and petitioner were present. Thus, Captain Gallagher's instructions to Drew were necessarily outside the presence of petitioner; Drew's activities in soliciting members and in reporting such members to the Police Department did not occur at meetings at which both petitioner and Drew were present; Drew's initial activities in organizing the local branch of the Congress, which he subsequently explained to petitioner, were obviously not participated in by

petitioner; and the record clearly demonstrates that Drew's appointment or election as the head of the local branch took place at a meeting or on an occasion when petitioner was not present (R. 112). These limitations on the cross examination of Drew prevented petitioner from placing Drew in his setting as an *agent provocateur* by reference to activities about which he had testified on his own direct examination and were, therefore, prejudicial error. *Alford* v. *United States, supra.*

The second object of the proposed cross examination was to show that Drew had testified falsely on his direct examination when he told petitioner that as a Negro, southern-born, he was against discrimination and wanted to help his people as well as all minorities. Petitioner was entitled, if not required, to recall this statement to Drew on cross examination as a foundation for contradicting it, by showing that Drew had himself obtained members for an organization which his superiors had designated as subversive, had turned their names over to the Police Department as subversives, had trafficked in discontent to his personal advantage, and had thereby injured and not helped his people. See Wigmore on Evidence (3rd ed. 1940), Section 982, 987, 1000, 1006, 1023. The refusal of the trial court to permit petitioner to ask Drew whether he had made the statement is demonstrably based on an erroneous view of the evidence, and, since the statement was made on an occasion when both Drew and petitioner were present, it is not justified even by the trial court's own improper limitation on the scope of cross examination. This prohibition on cross examination also constituted prejudicial error. *Alford* v. *United States, supra.*

The third object of the proposed cross examination was to attack Drew's credibility by showing his bias, interest, and

POOR COPY
BLEED THROUGH

misconduct. For this purpose, petitioner was entitled, as a matter of right, to question Drew as to any subject, whether or not included in the direct examination, which would discredit or destroy his testimony on direct examination and detract from his worthiness to be believed, especially since, as noted above, his testimony was largely uncorroborated and went to the commission by petitioner of the acts relied upon for conviction.[41] Accordingly, it was prejudicial error for the trial court to restrict such questions to matters testified to on direct examination. And "no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross examination short of an attempted invasion of his constitutional protection from self-crimination properly invoked." *Alford* v. *United States, supra.*

Here the trial court, on its own motion, assumed the obligation to protect Drew from questions, fairly included in the offer of cross examination, which would have discredited him by showing his bias, interest and misconduct. Petitioner was entitled to enquire of Drew as to the "thorough loyalty check", which, according to Captain Gallagher, he had undergone before his selection as a member of the Undercover squad, to determine whether he had any bias against the National Negro Congress, which would lead him to report its activities or the activities of persons such

---

[41] *Alford* v. *United States, supra,* and cases there cited; *District of Columbia* v. *Clawans,* 300 U. S. 619, 630-631, 632 (1937); *Majestic* v. *Louisville & N. R. Co.,* 147 F. 2 621 (C. C. A. 6, 1945); *Garber* v. *United States,* 145 F. 2d 966 (C. C. A. 6, 1944); *Banning* v. *United States,* 130 F. 2d, 330, 339 (C. C. A. 6, 1942); *Simon* v. *United States,* 123 F. 2 80, 85 (C. C. A. 4, 1941) and cases there cited; *Morton* v. *United States,* 60 F. 2d 690, 699 (C. C. A. 7, 1932) cert. denied 288 U. S. 607 *Muller* v. *Territory of Oklahoma,* 149 F. 330, 335 (C. C. A. 8, 1906); Wigmore on Evidence (3rd ed. 1940) Sections 948-949, 963, 969, 1005, 1021-1022, 2062.

as petitioner who were interested in it, in a hostile or prejudiced manner. Petitioner was entitled to show that Drew, as a "rookie" detective had failed as an undercover agent in his first assignment in Harlem, and that when he found no "subversive" Congress on the East Side, he had exceeded his authority, created one, and become the head of it, in order to enlarge his reports and increase his personal standing with his superiors in the Police Department. Petitioner was entitled to show Drew's moral obliquity, misconduct, and improper activities bordering on entrapment (*cf. Cratty* v. *United States*, 163 F. 2d 844, 850-851 (App. D. C. 1947) and cases there cited) in promoting subversive activities which would not have existed and in soliciting members who would not have joined a subversive organization, but for Drew. Drew's double role, under a false name and fictitious identification as the head of a subversive organization which he had created, and as an undercover agent making nightly reports to the Police Department of subversive activities which he was promoting are circumstances which clearly show his overzeal, bias, interest and misconduct and which petitioner was entitled to probe fully and as a matter of right. The denial of this right, we submit, constitutes prejudicial error. "Common experience teaches us that the testimony of such witnesses (detectives), especially when uncorroborated, is open to the suspicion of bias . . . and that their cross-examination should not be curtailed primarily . . . especially when it has a bearing on the substantial issues of the cases."[42]

The proposed cross examination was not merely related to the discrediting of Drew as such, but had a direct bearing

---

[42] *District of Columbia* v. *Clawans*, 300 U. S. 617, 630-631 (1937) and cases and authorities there cited.

cf. "I cannot adopt the contention that government spies are any more trustworthy, or less disposed to make trouble in order to profit therefrom, than are spies in private industry . . . Now that

POOR COPY
BLEED THROUGH

on the accuracy and motive of Drew's attribution of Communist Party membership to petitioner. If Drew's assignment to investigate a local branch of the Congress led him to create one where none existed, did it also lead him to report persons, such as petitioner, who attended its meetings or were active in its affairs as Communists, when in fact they were not? Such a line of inquiry is solidly grounded in another phase of Drew's testimony, as to which cross examination was permitted. Harper had testified unequivocally that he had ceased to be a member of the Communist Party in 1938 (R. 78) and Drew had testified on cross examination that in 1940 and 1941 Harper had engaged in no Communist Party activities with Drew which Drew recalled and that Drew did not know whether Harper was a member of the Communist Party in 1940 and 1941 (R. 127). On further cross examination, however, Drew admitted that he had made written reports to the Police Department in 1940 and 1941 that Harper was then a member of the Communist Party and had then engaged in Communist Party activities (R. 127-128, App. 61).

These reports were read to him and he verified them.[42] His testimony as to petitioner's membership and activities

---

it appears that government spies constituted in December 1919 an active and efficient part of the Communist Party, it may well be that the Secretary of Labor will find it desirable, through his own forces, to institute some investigation of the nature and extent of the possible activity and influence of these spies in giving form and color to the documents on which the Secretary based his ruling in the *Preis* case.

As the evidence now stands, no important human rights should be determined on the basis of documents whose original and form are under such well grounded suspicion. (Anderson, Circuit Judge, in *Colyer* v. *Skeffington*, 265 F. 17, 69).

[42]Q. I will ask you whether or not on August the 24th, you made a statement written or oral. that the *comrades* at a party at

was based on these written reports from which he refreshed his recollection (R. 92, See Note R. 97). If his testimony was inaccurate as to Harper, was it also inaccurate as to petitioner? If he had reported Harper as a Communist Party member, engaging in Communist Party activities, in 1940 and 1941, when he admitted on the stand that he did not know that Harper was then such a member or had been engaged in such activities, did he also report petitioner as such a member, engaged in such activities, during the same period, when the basis of his testimony as to petitioner was the same written reports which he had made as to Harper? If Drew had any motive to contradict his written reports about Harper, a government witness,[44] did he have any motive which led him to testify as he did, about petitioner, in order to substantiate the same written reports?

If the proposed cross examinaton had been allowed to show the full extent of Drew's activities as an *agent provocateur* in the National Negro Congress, it might have provided the answer to these questions by showing Drew's motives: his bias in shading his testimony to assist the prosecution to protect Harper and convict petitioner; his interest in the outcome of the trial, which principally depended on the reliability of his undercover reports; and his misconduct in creating a "subversive" organization and

---

Jean Madof's, 408 East 10th Street, included Bob Appel, Frances Sutton, *Louis Harper*, Elsie Harper, *all members of the C. P. 6th A. D.* A. Yes, sir (App. 61 italics supplied). Q. By the way, when you use the initials C. P., you mean the Communist Party? A. I do (R. 128). The Communist Party has several sections that are located throughout the city within Assembly Districts. They take the same numerical number of the Assembly District as is allotted by the City (R. 101). See also R. 127-128.

---

[44]Harper in 1940-1941 was employed by the Federal government as a computer in Coast and Geodetic Survey (R. 73).

POOR COPY

BLEED THROUGH

soliciting members for it, in order to amplify his reports and obtain the favor of his superiors in the Police Department. Prejudice results from the denial of the opportunity for such cross examination, even though it cannot be shown that the examination would necessarily have brought out such discrediting facts. *Alford* v. *United States, supra.*

The court below held that these limitations upon the cross examination of Drew were not erroneous because "Full opportunity was given to explore the testimony given on direct. The limitations were upon the testing of credibility by inquiring into matters not included in direct examination" (R. 279). From the detailed analysis submitted above of Drew's testimony on direct examination and petitioner's offer of proof with respect to the subject matter of that examination, we submit that the court below is wrong. Full opportunity to explore that testimony with reference to Drew's role in the National Negro Congress was denied, except under a three-fold limitation which is unwarranted by applicable law and decisions. The limitations which were imposed restricted petitioner's right to cross examine Drew on credibility even with reference to his testimony on direct examination, as is shown by the trial court's refusal to permit the question as to whether Drew had testified that he was always out to help his people, and by the refusal to permit other questions, included in the offer, about Drew's activities in the National Negro Congress, about which he had testified on direct examination.

As to the proposed attack on Drew's credibility to show his bias, interest and misconduct as an *agent provocateur*, the court below held:

> "We do not find any undue restriction of cross examination on that subject. The witness was asked

and answered, without objection or restriction a series of questions upon it. He stated that he organized or helped to organize the East Side Council of the Congress, that the witness Harper helped him to organize it, and that he (the witness) solicited memberships in it. Full argument as to the witness's role was available to appellant on that testimony. The witness's activities were collateral to the issue in this case. Only to the extent that they constituted misconduct which had a tendency to show his lack of honesty or truthfulness could he be cross examined upon them, and the court having permitted sufficient inquiry to establish the basic facts in this respect, could in its discretion control the extent to which the matter could be pursued."[19]

---

[19]*Pullman* v. *Hall*, 55 F. 2d 139, 141 (C. C. A. 4th, 1932) and authorities there cited; *Simon* v. *United States*, 123 F. 2d 80, 85 (C. C. A. 4th, 1941) and cases there cited. See *Ewing* v. *United States*, 77 U. S. App. D. C. 14, 135 F. 2d 633 (1942) *cert. denied* 318 U. S. 776, 87 L. ed. 1145, 63 S. Ct. 829 (1943)".

We submit that Drew's activities as an *agent provocateur* were not collateral to the issues in this case. These were the very activities, testified to by Drew on direct examination, which created the conditions relied on by the government to prove the falsity of petitioner's statements under all the counts of the indictment except the two relating to conscription. Thus, it was at meetings of the East Side branch of the Congress, that Drew introduced petitioner as a speaker, under the name of Tony Whales, a member of the Communist Party (R. 111); it was at another meeting of the same Congress that Drew testified that he was one of the principal speakers with petitioner, who was introduced as Tony Whales (R. 114-115), it was at another meeting sponsored by the same Congress, at

POOR COPY
BLEED THROUGH

which petitioner as reported by Drew, advocated that "now is the time for revoution" (R. 116); it was at other meetings between representatives of the Congress and of the Communist Party that Drew identified petitioner as having contributed services to or participated in the activities of the Communist Party as set forth in the indictment (R. 112, 115, 116-117). If Drew had not created the Congress, called these meetings (R. 115), and engaged in activities as the head of the local branch of the Congress, this evidence of petitioner's activities would not have existed. Under the applicable decision, the test of whether or not a matter is collateral is "whether it concerns 'a matter which you would be allowed on your part to prove in evidence,' . . . i.e. if the witness had said nothing on the subject. 3 Wigmore Section 1020", *Ewing* v. *United States,* 135 F. 2d 633, 641 (App. D. C. 1942) cert. denied 318 U. S. 776 and cases there cited. The mere fact that the matter is offered for impeachment does not make it collateral. Facts which have a direct bearing on the bias, interest, misconduct or other deficiencies of the witness and which are so related to the case that they could be admitted by extrinsic evidence as part of their proponent's own case are admissible as a matter of right on cross examination. See Wigmore on Evidence (3rd ed. 1940) Sections 944, 948, 963, 982, 1005, 1020-1022, 1810.

Here, if Drew had testified in his direct examination without ever having said a word about his employment as an undercover agent, his failure to find an existing branch of the Congress in Harlem or on the East Side, or his reports to the Police Department about the activities of petitioner in relation to the Congress, it would have been prejudicial error to exclude independent and otherwise admissible evidence of those facts, if offered by petitioner, to

show Drew's bias, interest and misconduct, as bearing on his lack of honesty and truthfulness. *Ewing* v. *United States, supra; Alford* v. *United States, supra; Morton* v. *United States, supra;* Wigmore ibid. That Drew did testify on these matters does not make them "collateral", nor does it defeat the right of petitioner to cross examine Drew fully as to those matters to show his deficiencies as a witness. Drew's credibility was as much an issue in this case as that of petitioner, since the government principally relied on his testimony to prove the falsity of petitioner's statements charged as false by the indictment (See Brief in Opposition to Petition, pp. 7-8).

Nor is this a case in which the trial court properly exercised its discretion in limiting the extent of cross examination. That examination had just begun and the questions which were propounded to Drew touched on only two matters—his organization of the local branch and his solicitation of members for it—of a lengthy series of questions, fairly included in the scope of the offer to prove, on which petitioner was entitled to cross examine. The trial court did not exercise its discretion after the subject had been exhausted, or to protect Drew from questions which went beyond the bounds of proper cross examination merely to harass, annoy or humiliate him. Here, as in the *Alford* and *Clawans* cases, it cut off in limine by improper restrictions all inquiry on which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error. *Alford* v. *United States,* 282 U. S. 694 and cases there cited. *District of Columbia* v. *Clawans,* 300 U. S. 632.

And, even if such cross examination was within the discretion of the trial court, it was improper for the trial

POOR COPY

court to base the exercise of that discretion, as it plainly did here, on the supposed inability of the predominantly Negro jury to act as a representative jury in weighing the evidence sought to be adduced. For reasons already stated, the race or color of the members of a particular jury, properly chosen and otherwise qualified to hear and consider evidence, is a prohibited basis for withholding evidence from them, under the Fifth and Sixth Amendments to the Constitution.

Under these circumstances, it is immaterial that, as the court below suggests, "full argument as to the witness's role was available to appellant upon that testimony" (R. 280). Full argument is obviously not a substitute for the right of cross examination which was improperly curtailed.[45]

C. Limitation on the Cross Examination of Harper and Drew with Respect to the National Negro Congress.

The third series of rulings involved the refusal of the trial court to permit cross examination of both Harper and Drew as to the purposes, objects and organization of the National Negro Congress.

As noted above, Harper and Drew had testified for the government with respect to petitioner's activities in connection with a local branch of the National Negro Con-

---

[45] Cf. the trial court's admonition to counsel for the petitioner, prior to his reserved opening statement, with obvious reference to the limitations imposed on the cross examination of Drew, which had just been concluded: "The Court . . . Mr. Ford, when you do make your opening statement, I ask you to be governed by the issues in this case, so that it won't be necessary for me to say anything . . . If you go beyond the issues, I will ask you to come up here . . . But I will do it so as not to make it appear I am cutting in on you." (App. 61). Cf. also, the court's interruption at App. 62-63.

gress, in support of Counts III (e) and (h) and IV (e) and (h) of the indictment. Captain Gallagher had earlier testified that the National Negro Congress was one of the "subversive" organizations which members of the undercover squad were assigned to investigate (R. 64, 65, 70). On the cross examination of Harper, petitioner sought to ascertain the purpose and objects of the National Negro Congress. Harper had replied by stating the reasons for the founding of the Congress, when, again without objection from the government, the trial court halted the examination, summoned counsel to the bench, and asked the purpose of the inquiry. Counsel for petitioner stated that since the government had brought out on its case that Harper had met petitioner at a meeting of the Congress, and that the Congress was concerned with problems of Negroes relating to housing, evictions and brutality, petitioner wished to show that petitioner was concerned with the Congress, because of its objects and not because of communism (R. 80-81). The necessary implication of counsel's reply was that the purpose of the proposed cross examination was to show that the Congress was not a subversive organization, that petitioner's activities in connection with the Congress were pursuant to legitimate, not subversive aims, and that proof of such activities was not proof that petitioner had contributed services to or participated in the activities of the Communist Party, as testified to by Harper and as charged in the indictment.

The trial court, however, stated "We are not concerned with this National Congress, sir . . . We will not go into this National Association for the Advancement of Colored People or the National Congress . . . we are not going into the organization and aims and desires of this Congress" (R. 81). Petitioner duly excepted to this ruling (R. 81).

POOR COPY

As also noted above, Drew was asked, on his cross examination, about his connections with the National Negro Congress. One of the grounds for pursuing the proposed line of cross examination, as stated by petitioner's counsel, was to develop under the heading of the National Negro Congress, all phases of the testimony of Drew, the basis for which was laid in his direct examination. The trial court's ruling, to which exception was taken, was that "I will not hear you on anything of that sort, save those meetings where he specifically attended, sir, and where Mr. Marzani was in attendance" (R. 124-125).

The court below found no error in the limitation imposed by the court below upon the extent to which this line of cross examination could be pursued, on the principal ground ground that "The subject matter was irrelevant to the issue in the case which was the truth or falsity of defendant's statement that he had never been a member of the Communist Party or been known as Tony Whales" (R. 280). But, Captain Gallagher had testified that the Congress was one of the subversive organizations which the Undercover squad was assigned to investigate. Drew and Harper had testified on their direct examination as to their own and petitioner's activities in connection with the affairs of that Congress. The indictment charged petitioner with having made false statements by denying such activities and services to the Communist Party as advising Party members to infiltrate groups for the purpose of creating Communist Front organizations and to sow discontent among Negroes by agitating the question of racial discrimination, to the end that members for the Party might be recruited (Counts III (e) and (h) and IV (e) and (h)). It was, therefore, relevant for petitioner to meet these charges in the indict-

ment and to rebut the testimony of Captain Gallagher, Harper and Drew, by showing that the Congress was not a subversive or Communist Front Organization, that his activities in connection with the Congress were not designed to sow resentment and discontent among Negroes for the purpose of recruiting Party members, but were pursuant to the legitimate and non-subversive aims of the Congress, about which Drew, as the head of a local branch, and Harper, as an informed and long-standing member of the Congress, were both qualified to testify. The testimony which was thus sought to be elicited was relevant to the issues in the case, related to testimony first brought out by the government in direct examination in its case, and should therefore have been permitted. The trial court's exclusion of the evidence, we submit, was prejudicial error.

D. The Failure to Treat the Predominantly Negro Jury in the Case as a Representative Jury.

The court below failed to find in any of these three series of rulings the basis which petitioner advances for them and held that the rulings would have been the same, regardless of the racial composition of the jury (R. 278-279). It pointed to the fact that petitioner "does not cite to us any specific place at which the court indicated such reasons for its ruling" (R. 278).

We submit that the reasons given by the trial court in his three extended colloquies at the bench fully warrant petitioner's contention (R. 186-189, 123-126, 79-81). In each instance, as soon as a question involving Negroes or the National Negro Congress was raised in such a way as to create, as the trial court apprehended, a danger that the predominantly Negro jury would be prejudiced in favor

POOR COPY

BLEED THROUGH

of petitioner, by his activities on behalf of Negroes (as in the incident involving police brutality against Negroes) or against the prosecution (as when petitioner attempted to show the misconduct of Drew, a Negro, in his activities as an *agent provocateur* in the local branch of the National Negro Congress, or that the Congress in which petitioner participated was not a subversive organization), the trial court on its own motion interrupted the examination and required a statement of its purpose, although such a statement is generally not required (*Alford* v. *United States, supra*). In each instance, the trial court limited the examination and prevented petitioner from adducing such evidence, even where it was admissible under the ordinary rules of evidence, as in the instance of his refusal to permit the proof offered with respect to Drew's activities as an *agent provocateur,* or the question as to whether Drew had stated that he was always out to help his people, because of its repeatedly expressed desire to avoid "sympathy" or "prejudice" in the case (R. 186-189). Although the record is replete with instances of the most inflammatory and prejudicial evidence offered by the government, much of it wholly irrelevant to the issues in the case, but not related to Negroes (R. 255, 108-109, 49-50, 231, 244-245, 248-249, 250-254, 218, 230, App. 64, 67, 71, 37-38, See pp. 59-61, *supra*) the trial court made no attempt to interrupt the questioning in these instances, and, if it did not overrule petitioner's objections, instructed the jury to disregard the testimony (R. 109). The clearest expression of the trial court's apprehension about the particular jury in the case came in the colloquy with respect to the direct examination of petitioner. There the trial court's statement that petitioner's testimony about the incident involving police bru-

tality against Negroes, which was directly in conflict with the testimony of Harper had the "other purpose" of prejudicing the jury and, in fact, did prejudice it, is clearly the rationale for his earlier rulings limiting Drew's cross examination and his refusal to go into "this National (Negro) Congress" although offered as to subject matter about which these witnesses had testified on direct.[46]

The trial court thus applied a unique standard for the admissibility of evidence, applicable only to this case and dependent upon the composition of the jury before it, rather than a universal standard, applicable to any respresentative jury. To the extent that the limitations which it imposed are not in accordance with the ordinary rules of evidence, those limitations are erroneous without regard to the motives of the trial court and cannot be justified, without violating constitutional guarantees, by the supposed peculiar susceptibility to prejudice of the predominantly Negro jury in the case. To the extent that the limitation of the testimony in question was subject to the trial court's discretion, the

---

[46]The government has, at least inferentially, conceded that the trial court took into consideration in its rulings the predominantly Negro composition of the jury. In its brief in the court below, it stated "As respects the evidence under discussion, the court, in one sense, may have justifiably given a measure of consideration to the fact that there were Negroes on the jury. The merit in the government's objection that the evidence was collateral, self-serving and therefore prejudicial being obvious—it would have been no more than natural for the court to have considered how much greater that prejudice would be with Negroes on the jury, in view of the very nature of the evidence sought to be introduced by appellant concerning his activities 'on behalf of' that race" (Brief for Appellee, p. 65). As to this evidence, counsel for the government asserted "There can be no fair trial before *this* jury if you go into the beatings" (R. 188, italics supplied) and announced the government's intention to move for a mistrial if the testimony persisted (R. 189).

POOR COPY

BLEED THROUGH

race and color of this particular jury was an improper and constitutionally prohibited basis for the exercise of that discretion. "(The law) must not be a special rule for a particular person or a particular case", *Hurtado* v. *California,* 110 U. S. 516, 535 (1884). The Constitution does not sanction a distinction among jurors on the basis of race or color.

We submit that the trial court's failure to treat the predominantly Negro jury in this case as a representative jury constitutes a denial to petitioner of his rights under the Fifth and Sixth Amendments to the Constitution, which requires a reversal of the judgment below and is equally action contrary to the public policy of the United States, which this Court should correct in the exercise of its supervisory powers over the Courts of the District of Columbia. *Hurd* v. *Hodge,* 334 U. S. 24 (1948).[47]

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case dismissed, or, in the alternative, a new trial should be ordered.

Respectfully submitted,

OSMOND K. FRAENKEL,
ALLAN R. ROSENBERG,
Attorneys for Petitioner

---

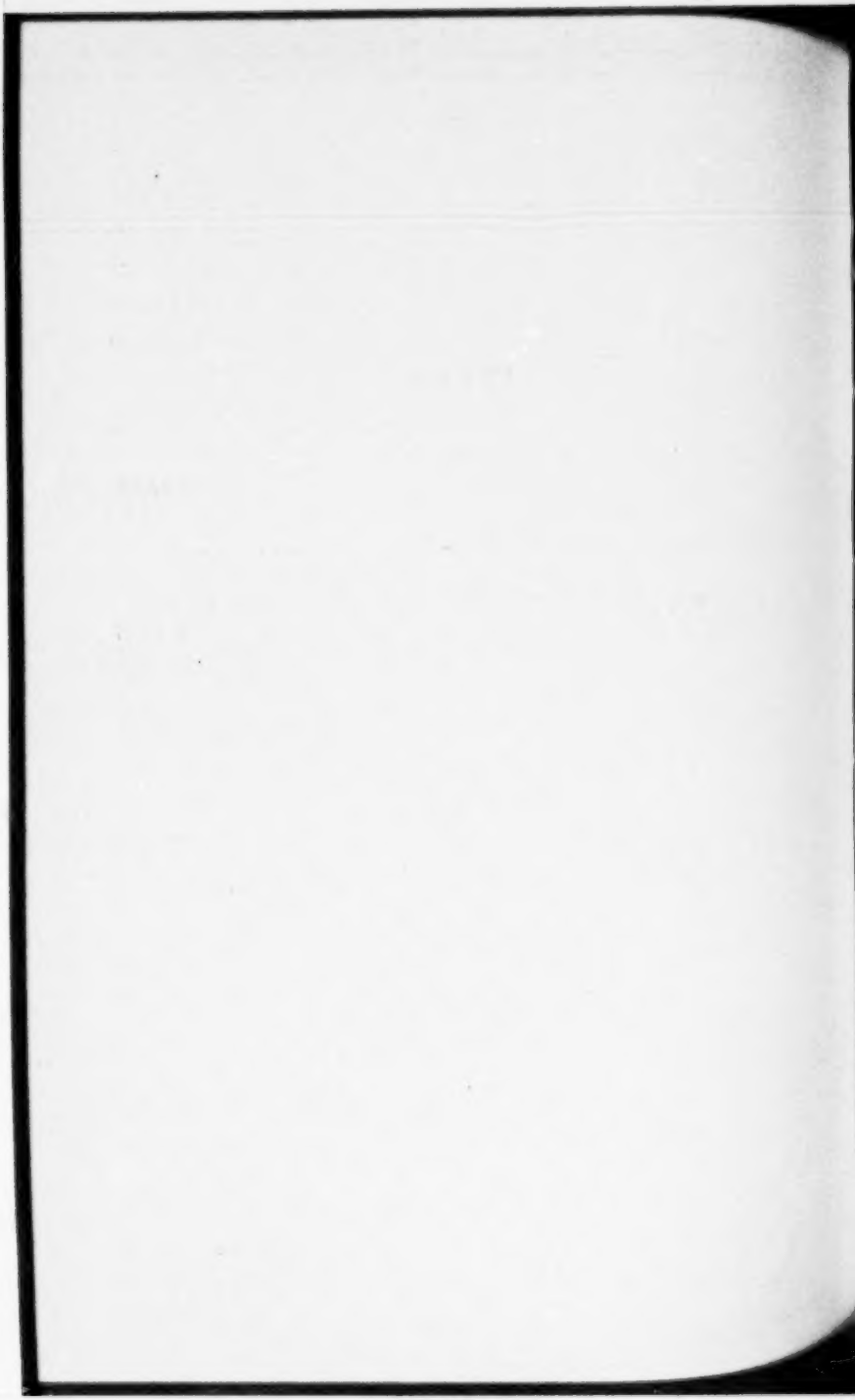
[47]See "To Secure These Rights" Report of the President's Committee on Civil Rights (1947), pp. 87-95.

INDEX

PAGE

A. Statutes 1

B. Excerpts from Testimony Proceedings and Exhibits 3



POOR COPY

BLEED THROUGH

A. Statutes

Criminal Code

Sec. 6. SEDITIOUS CONSPIRACY. If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States, contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both (U. S. C. Title 18, Sec. 6).

Alien Registration Act, 1940

Sec. 9. (A). It shall be unlawful for any person, with intent to interfere with, impair or influence the loyalty morale or discipline of the Military or Naval forces of the United States.

(1) To advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny or refusal of duty by any member of the Military or Naval forces of the United States . . .

Sec. 10. (A). It shall be unlawful for any person (1) to knowingly and wilfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence or by the assassination of any officer of any such government . . . (U. S. C. Title 18, Secs. 9-10).

Judicial Code

Sec. 269 Amended . . . . On the hearing of any appeal, certiorari, unit of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after

an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties (U. S. C. Title 28, Sec. 391).

New York Anarchy Act

Sec. 160. CRIMINAL ANARCHY DEFINED. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of the government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Sec. 161. ADVOCACY OF CRIMINAL ANARCHY. Any person who:

(1) By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence or by assassination of the head or of any of the executive officials of government or by any unlawful means; or . . . .

(4) Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Sec. 162. ASSEMBLAGES OF ANARCHISTS. Whenever two or more persons assemble for the purpose of advocating the doctrines of criminal anarchy, as defined in Section one hundred and sixty, such an assembly is unlawful and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony (New York Penal Law, Sec. 160-162).

POOR COPY

BLEED THROUGH

B. Excerpts from Testimony Proceedings and Exhibits

Opening Statement on Behalf of United States

Mr. Kelley. May it please the Court and coun-
66 sel, and ladies and gentlemen of the jury:

The facts in this case are not at all complicated. The indictment consists of nine counts, or distinct and separate charges of a violation of the criminal statute.

There is however, a similarity between the vari-
67 ous charges composing the indictment in this sense:

each count relates to the same trial, and each count, therefore, charges that the defendant, namely, Mr. Marzani, made a false and fraudulent statement and representation to an agency of the United States Government——

The Court. May I interrupt you, Mr. Kelley?

Mr. Kelley. Yes, your Honor.

The Court. Did I understand you to say nine counts?

Mr. Ford. That is what he said.

Mr. Kelley. I meant to say nine counts dealing with the agency. There are a total of eleven counts; excuse me.

The Court. Very well.

Mr. Kelley. The last two counts relating to a false statement being made to an agent of the State Department.

The first four counts aver that the defendant made false and fraudulent statements to agents of the Federal Bureau of Investigation.

Counts 5, 6, and 7 charge that on a date to be named, the defendant made false and fraudulent statements to agents of the Civil Service Commission, and counts 8 and 9 likewise charge the making of false and fraudulent state-

ments to agents of the Civil Service Commission on a different date.

Then they come to the two last counts, which your Honor just reminded me of, relating to false statements made to the State Department.

The charge is made in three counts; one relating
68 to the Federal Bureau of Investigation, an offense charged as having taken place on the 29th day of July of 1942, that the defendant wilfully, knowingly and feloniously, falsely stated and represented to agents of the Federal Bureau of Investigation that he was not then and never had been a member of the Communist Party.

In count 6, the same alleged false statement is charged as having been uttered on the 22nd day of November of that year, 1942, made to agents of the Civil Service Commission, the same false statement and representation that he had never been and was not then a member of the Communist Party.

The same false statement is charged in another count of the indictment, count 10, that on or about June 1 of 1946, the defendant made the false statement and representation to the State Department that he had never been and was not then a member of the Communist Party.

Count 2 relates to the statement made to the F. B. I. to the effect that on July 29 of 1942 the defendant falsely stated and represented that he had never attended meetings of the Communist Party.

Count 3 similarly charges a false statement to the F. B. I. in that he is charged with on the 29th day of July, 1942, with having falsely stated and represented that he had never contributed any services to the Communist Party.

POOR COPY

BLEED THROUGH

Count 4 charges that to agents of the F. B. I. on
69 July 29, 1942, he made the false, fraudulent statement and representation that he had never participated in any of the activities of the Communist Party.

In counts 5, 8, and 11, he is charged respectively with having made false statements to the Civil Service Commission on the 23rd day of November, 1942, to the Civil Service Commission on the 20th day of April, 1943, and to the State Department on or about June 1, 1946; in each case last referred to, being charged with having falsely stated and represented that he had never used the name or been known as Tony Whales or by any similar name.

In counts 7 and 9 he is respectively charged with having falsely stated to agents of the Civil Service Commission on November 23, 1942, and on April 20, 1943, that he had never made any speeches against the conscription bill.

Now, it is my understanding that at the proper time this Court will charge you that the Government, as a matter of right, may inquire into the fitness and the suitability and the loyalty of employees of this Government or prospective employees——

Mr. Ford. (Interposing) May it please your Honor, I object, in his opening statement as to what his view of the law is.

We must wait until all the law as your Honor
70 will give it to the jury——

The Court. I think it will be well for you to make your statement on the facts, sir.

The Court will, as counsel has said, instruct the jury as to the law in the case.

Mr. Kelley. The Government must assume, because it has to assume and does here, the burden of establishing this defendant's guilt beyond a reasonable doubt.

We will undertake to do so by proving the following facts:

That this defendant applied for Government employment sometimes during the month of February of 1942;

That he received an appointment to a position in the Federal Government in an agency which was then known as the Coordinator of Information, frequently referred to as C. O. I.; that he received that appointment on the 7th day of March of 1942.

We will offer proof to establish that in a matter of a few weeks that agency, the Coordinator of Information, was by executive order created into what was called Office of Strategic Services, and that the defendant continued to be employed by that agency, O. S. S.

The evidence will establish his initial appointment on March 7 of 1942, and such later changes in his status as a Government employee, all conditioned upon his satisfactory loyalty test being conducted in connection with which
71 he would be found suitable on those grounds for continued employment.

The evidence will show that immediately following his employment by C. O. I., that agency requested the Federal Bureau of Investigation to undertake to investigate the history and background of this defendant to determine the matter of his loyalty, and that his employing agency, C. O. I., also at or about the time of his commencement of employment, requested the Civil Service Commission to conduct an investigation concerning his loyalty or lack thereof and that that agency did, in fact, undertake an investigation of that character.

POOR COPY

BLEED THROUGH

The Government's evidence will likewise establish that on July 29, 1942, the Federal Bureau of Investigation conducted through one of its agents, an interview with the defendant, during the course of which the defendant was placed under oath; that that interview was a part of and connected with its investigation of his loyalty.

The evidence to be offered by the Government will establish that at that time the defendant was asked whether he was then or ever had been a member of the Communist Party, and that he answered categorically "No";

That he was at the same time asked concerning whether or not he had ever attended meetings of the Communist Party, to which question categorically he replied "No."

72 During that interview with an agent of the F. B. I., still while under oath, he falsely stated in response to a question that he had never contributed any services to the Communist Party.

And we will further show that in response to a question by the agent of the F. B. I. as to whether or not he had participated at any time in the activities of the Communist Party, he answered categorically "No."

Further proof of the Government will establish that after he had been so interrogated by an agent of the F. B. I., a copy of his statement was furnished them and that later on —to be exact, on the 23rd of November of that year—he was interrogated by an agent of the Civil Service Commission here in Washington;

That at that time also he was placed under oath and he was asked by that agent of the Civil Service Commission whether or not he had ever used the name of Tony Whales, or been known by a similar name. Whereupon, he answered categorically "No."

That at that same hearing he was asked whether or not he had ever made speeches against conscription and that he answered categorically "No."

And similarly, that during the course of that interrogation on November 23, 1942, he was also asked whether or not he was then or had ever been a member of the Communist Party and again answered categorically "No."

Further, the Government's evidence will show
73 that following that hearing in November of 1942, and some time approximately late in December or early in January the following year of '43, the defendant and his employing agency, O. S. S., were notified by the Civil Service Commission that as a result of its investigation, it found the defendant Marzani unsuitable for Government employment and requested his dismissal.

The evidence will further show that immediately thereafter the defendant filed with the Commission a notice of appeal from that decision, requesting a hearing;

That the request was granted, and that on the 20th day of April, 1943, a hearing was had here in Washington before the Board of Appeals and Review, which is a part of the Civil Service Commission.

That during the course of that hearing, and while he was under oath, the Government will offer evidence to establish that he was asked by an agent or representative of the Civil Service Commission whether he had ever been known as Tony Whales, or had used a similar name, and that he responded in the negative, to the effect that he had not used the name Tony Whales.

The evidence will further show that during the course of that hearing before the Board of Appeals and Review, the defendant was asked whether or not he had ever made any speeches against conscription, and that he denied having

POOR COPY

BLEED THROUGH

done so, and that also at that hearing he was asked
74 whether or not he had ever been a member of the Communist Party, and that he answered "No."

Lastly, insofar as proof of the alleged false statements are concerned, the Government will offer a witness who will testify that on or about June 1, 1946, he interrogated the defendant in his official capacity as a representative of the State Department, and during the course of that interrogation, which was not under oath, the defendant stated to him that he was not and had never been a member of the Communist Party.

And that during the course of that interview with the witness who was an official of the State Department, the defendant was also asked whether or not he had ever used the name of Tony Whales or a similar name, and that he responded he had not.

Those, ladies and gentlemen, constitute a recital of the proof that the Government will introduce to establish what this defendant said at various periods to agents of the Government of the United States in connection with a matter in its jurisdiction.

The burden rests upon the Government, since it has alleged that those statements were false and fraudulent, to prove that fact.

The Government will undertake to introduce evidence at this trial to establish that every and every of those
75 representations were utterly false, and known to the defendant to be false at the time.

The Government's proof will establish that in 1940 this defendant held a position of branch organizer in the Communist Party, in the Sixth Assembly District of New York City, and later on that year, from 1940 until early

in '41, he became and held another office in the Communist Party in the Sixth Assembly District, known as Section Educational Director.

The Government will offer proof as charged in the indictment that the defendant attended as a member of the Communist Party many meetings of that Party.

It is alleged that all of the meetings that he attended—or it is charged in the indictment—were in the City of New York.

Moreover, in establishing the proof required under the charge that he had falsely denied participating in the activities of the Communist Party, the Government will offer proof that this defendant, Carl Aldo Marzani, delivered lectures to the Communists on the principles of Communism.

That the defendant issued and collected Communist Party membership books in his capacity as an official of the Party;

That this defendant Marzani composed, edited, published and distributed pamphlets in the interest and on behalf of the Communist Party;

That he further counseled and advised Com-
76 munist Party members and recruits with respect to methods and means to be employed in infiltrating divers groups in society for the purpose of creating Communist Party front organization.

The evidence will further establish that this defendant Carl Marzani urged Communist Party members to protest to their Congressmen against the passage of an anti-strike bill, and that he so urged them in his capacity as an officer of the Party.

The evidence will further establish that this defendant, during the course of Communist Party meetings and recruit

POOR COPY

BLEED THROUGH

meetings, instructed the members known in the Party as comrades to obtain recruits for the Communist Party, that is to say, drum up business.

The evidence will further show that this defendant counseled and instructed Communist Party members to sow resentment and discontent among Negroes, by agitating questions of racial discrimination to the end that members for the Communist Party might be recruited from the ranks of Negroes.

The evidence to be offered by the Government will further show that this defendant urged Communist Party members to attend study classes to the end that they might improve their knowledge of the doctrines and the methods of the Communist Party.

We will further establish that the defendant did
77 distribute among Communist Party members tickets to a showing of the Soviet film entitled "Great Beginning." And that in his capacity as Branch Organizer of Branch F-2, the Sixth Assembly District of New York, this defendant did counsel and instruct divers party members concerning a plan, policy and program of that Communist Party, such plan and program having for its purpose, one, disintegration of the morale of the military forces of the United States; second, that he did urge members of the party to teach the principles of Communism to men in the military forces with whom they would come in contact, and that he did urge the recruiting of members for the Communist Party from the ranks of the military forces of this country to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist system.

The Government will offer proof that during 1940 and 1941 up to approximately the 22nd day of June of 1941, this defendant consciously was known as and consciously used and employed an alias "Tony Whales".

Previous to that time, dated from August of 1939, a peace pact existed between the Soviet Union and Germany. As you know, the attack on the 22nd of June was swift and unadvanced by notice.

Mr. Ford (interposing). May it please your
78 Honor, does he offer now that he is going to show these things as facts?

Mr. Kelley. Yes. The Court will take judicial notice of that.

Mr. Ford. "Swift" and "sudden"?

I have no objection to that if he proves the fact that it was swift and sudden.

Mr. Kelley. Yes. The Government will further establish that up to the 22nd day of June, 1941, the date of the attack by Germany on Russia, this defendant actively advocated in his capacity as branch leader or organizer and subsequently in his capacity as Section Educational Director, the Party line, insofar as it was to be implemented by his associates and comrades in his branch and those with whom he worked in an official capacity, to the extent or urging upon them and appointing committees from among the Communist Party members in his branch to picket certain Congressmen, advocating that that Congressman vote against conscription.

Also to picket Congressmen advocating that Congress vote against lend-lease, and vote against repeal of the neutrality act.

POOR COPY

BLEED THROUGH

It will further show that this defendant in his capacity of a leader within the Party would advocate and recommend the fomenting of strikes in industries and plants which were then or who might contemplate production of materials for war. And the evidence will show that within
79 a matter of a few days or two weeks, roughly, this defendant ceased advocating such measures to members of the Party and himself became connected with an organization known as Defend America and Smash Hitler, and that immediately from the public rostrum, from street corners, meetings and rallies, he advocated consistently that we do get into the war; that we do give lend-lease aid; that the program for selective service be implemented and cooperated with; all-out aid should be given to Churchill and to Stalin, and full cooperation with the leadership in this country.

The evidence will show that that transition was abrupt and clean-cut.

It will not be my purpose to undertake in this summary that I have given of the evidence of falsity that the Government intends to introduce to cover every item that may be offered in evidence, but I feel that I have covered the major portions of it.

And I give my assurance to this jury that it is the purpose of the Government to prove this defendant guilty only by such evidence and beyond a reasonable doubt.

I thank you.

Mr. Ford. Would your Honor care to make that statement to the jury now?

The Court. Yes. You will reserve your opening statement at this time?

Mr. Ford. Yes, sir.

80 The Court. Ladies and gentlemen of the jury, the Government has made its opening statement, as is its right.

The defendant likewise has a right to make its opening statement at this juncture or at a later juncture.

Counsel for the defendant has indicated to the Court he prefers to make his opening statement later.

I will state to you now, however, that the statement made by the Government counsel or statement to be made by defendant's counsel is not evidence in this case. It is merely what they expect to show you by way of evidence from the witness stand.

That is true as to the Government. That will be true as to the defendant when his counsel makes his opening statement.

You may proceed with your evidence now, Mr. Kelley.

* * * * *

The Court. I then understand that you are offering No. 4 and it may be received. 91

(Thereupon, Government's Exhibit No. 4 for identification, was received in evidence.)

Mr. Kelley. We are offering them on the basis of their certification, your Honor.

Mr. Ford. As to Government's Exhibit marked No. 5, your Honor, there are three pages, and we have no objection.

The Court. It will be received in evidence.

(Thereupon, Government's Exhibit No. 5 for identification, was received in evidence.)

Mr. Ford. We have no objection, may it please your Honor, to Government's Exhibit No. 6.

POOR COPY

BLEED THROUGH

The Court. It will be received.

(Thereupon, Government's Exhibit No. 6 for identification, was received in evidence.)

Mr. Ford. The same applies to Government's Exhibit No. 7.

The Court. No. 7 will be received.

(Thereupon, Government's Exhibit No. 7 for identification, was received in evidence.)

Mr. Ford. As to No. 8, the same thing, your Honor.

The Court. No. 8 will be received.

(Thereupon, Government's Exhibit No. 3 for identification, was received in evidence.)

Mr. Ford. The same as to Government's No. 9.

The Court. No. 9 will be received.

(Thereupon, Government's Exhibit No. 9 for identification, was received in evidence.)

Mr. Ford. The same as to No. 10.

The Court. 10 will be received.

(Thereupon, Government's Exhibit No. 10 for identification, was received in evidence.)

Mr. Ford. The same as to 11.

The Court. No. 11 will be received.

(Thereupon, Government's Exhibit No. 11 for identification, was received in evidence.)

Mr. Ford. The same as to 12.

The Court. No. 12 will be received.

(Thereupon, Government's Exhibit No. 12 for identification, was received in evidence.)

93

Mr. Ford. May I ask him whether there is a question in item No. 13 as to whether he is in the capacity of the office?

The Court. Something he knows as custodian of those records?

Mr. Ford. Yes, sir.

The Court. Do you want to tell Mr. Kelley what you are going to ask?

Mr. Ford. Yes.

(Counsel conferred with each other.)

By Mr. Ford:

Q. On Government's Exhibit No. 13, in writing at the bottom thereon appears this language:

"He is detailed back to OSS and is retaining his badge and other identification. 11/1/43."

Mr. Kelley (interposing). Is that "retaining" or returning"?

Mr. Ford. "Retaining."

That is November 1, '43.

POOR COPY

BLEED THROUGH

By Mr. Ford:

Q. On the writing here "He is detailed back" that means he is ordered back to the State Department to that same position; right?

A. At that time he was an employee of the Office of Strategic Services.

Q. I understand that. Then he went in the
94 Army and after he was in the Army he was detailed back to take the same job that he had when he gave it up to go into the Army; right?

A. That is right.

Mr. Ford. That is what I meant, to clarify that language, your Honor.

Mr. Kelley. We can stipulate that that is its meaning, Mr. Ford.

Mr. Ford. All right.

No objection to No. 13, then.

The Court. 13 is received.

(Thereupon, Government's Exhibit No. 13 for identification, was received in evidence.)

Mr. Ford. May it please your Honor, the following language appears on Government's Exhibit No. 14, which is dated September 26, 1943, and under "Remarks or proposed duties" this language appears:

> "Mr. Marzani is being released from the Army on 17 September. It is desired to return him to his civilian status with this Branch."

It is agreed, I understand, between Government counsel and myself that that means when Mr. Marzani got out of the Army, the personnel section of the State Department

desired his return to that same job, to come back to it. Is that correct?

Mr. Kelley. Yes.

The Court. With that stipulation, it will be received in the record.

Mr. Ford. All right. That is No. 14, if your Honor please.

The Court. Yes, sir.

(Thereupon, Government's Exhibit No. 14 for identification, was received in evidence.)

Mr. Ford. Government's 15, your Honor, consisting of six pages, we have no objection to it.

The Court. It will be received.

(Thereupon, Government's Exhibit No. 15 for identification, was received in evidence.)

Mr. Ford. The same as to Government's 16.

The Court. It will be received.

(Thereupon, Government's Exhibit No. 16 for identification, was received in evidence.)

Mr. Ford. As to Government's No. 17, I do not question its accuracy, but I do not concede its relevancy or competency to any charge in this case.

Would your Honor care to look at it?

(The exhibit was handed to the Court.)

Mr. Kelley. If your Honor please, I say that it becomes relevant and material because of a matter of law——

POOR COPY

BLEED THROUGH

The Court. Suppose we don't discuss it at this time. I will receive it, subject to your motion to strike if he fails to show its materiality or relevancy.

(Thereupon, Government's Exhibit No.
96 17 for identification, was received in evidence.)

* * * * *

The Court. Your are at liberty to read them, sir.
103 Mr. Kelley. I desire to read portions only of the exhibits which were received in evidence, and I now refer to Government's Exhibit 4, which is dated February 10, 1942, with the heading "Coordinator of Information" and is entitled, "Application and personal history statement," on the last sheet of which appears a signature purporting to be that of Carl A. Marzani.

And having reference to Government's Exhibit 5, composed of two photostatic copies of telegrams, each of them dated March 4, 1942; the first addressed to Carl A. Marzani at 643 East 6th Street, New York. It is from James B. Opsata, Chief of Personnel Division, Coordinator of Information.

It reads:

"Your appointment as economic editor P-4 $3,800
104 per annum. Economics Division, Office of Coordinator of Information approved urgent you report as soon as possible. Wire collect date you expect to arrive Washington, D. C. Report to room 113 Apex Building, 7th and Pennsylvania Avenue."

The remaining telegram in this exhibit is addressed to Mr. Opsata, signed by Carl A. Marzani, and reads:

"Appointment accepted as economic editor P-4 $3,800 per annum. Reporting for work Friday 6th."

Referring to Government's Exhibit 6, it is a photostatic copy of a letter from Mr. James P. Opsata, Chief of Personnel Division, addressed to the United States Civil Service Commission, under date of March 4, 1942:

"Gentlemen:

"In accordance with the provisions of Executive Order No. 8564, authority is requested for the appointment of Mr. Carl A. Marzani to the position of economic editor, P-4, $3,800 per annum, in the Economics Division, Office of the Coordinator of Information."

Referring to Government's Exhibit 7, it is a letter from L. A. Moyer, Executive Director and Chief Examiner, on the letterhead of the United States Civil Service
105 Commission, under date of March 6, 1942, addressed to the Coordinator of Information:

"Sir:

"As requested on March 4, 1942, the appointment of Mr. Carl A. Marzani (date of birth, March 4, 1912) as economic editor, P. 4, $3,800 per annum, Office of the Coordinator of Information, is approved, under Executive Order No. 8564 of October 8, 1940, for the duration of the national defense program, subject to character investigation."

Reading from Government's Exhibit 8, a document signed by James B. Opsata, on the letterhead of the Coordinator of Information. Its date is March 7, 1942, and it bears the name of "Carl A. Marzani" and the language "nature of action: indefinite appointment."

POOR COPY

BLEED THROUGH

"Effective date: March 7, 1942."

To the position of "economic editor."

Under the title "Remarks" appears the following language:

> "This appointment is subject to a favorable report of the character investigation being made by the United States Civil Service Commission."

With reference to Government's Exhibit No. 9, entitled, "Personnel affidavit," it recites:

> "Coordinator of Information, Research and Analysis, Economics, Washington, D. C."
>
> "Carl A. Marzani."

Followed by a printed oath, and there appear in two places to be a signature purporting to be that of Carl A. Marzani, and it has been notarized before a notary public.

Referring to Government's Exhibit 10, headed, "Coordinator of Information," dated June 30, 1942, signed by James B. Opsata, addressed to Carl A. Marzani, entitled,

> "Nature of action: Change in status.
> "Effective date: June 30, 1942."

It recites his transfer in status from economic editor at $3,800 per annum to the position of senior economic editor, P-5, at $4,600 per annum, and under "Remarks" recites:

> "This appointment is subject to a favorable report on the character investigation being made by the United States Civil Service Commission."

Referring to Government's Exhibit 11, a similar document to the last one read, save for the fact that the words "Coordinator of Information" at the top have been stricken

out in typewriting and there has been inserted "Office of Strategic Services."

It is likewise signed by James B. Opsata, under date of November 21, 1942, addressed to Carl A. Marzani, entitled:

> "Nature of action: Change in status and transfer within OSS."

107 "Effective date: November 21, 1942."

And it recites the change in status from the position of senior economic editor at $4,600 to the position of chief, editorial section, at $5,600 per annum, P-6.

Referring now to Government's Exhibit 12, identical in the heading of the last one read—OSS—addressed to Carl A. Marzani, dated August 2, 1943.

> "Nature of action: Change in status.
> "Effective date: August 2, 1943."

It recites a transfer in status from chief, editorial section, to the position of assistant chief, salary to remain constant at $5,600 a year.

It likewise bears the notation under "Remarks":

> "Subject to a favorable report of the character investigation being made by the United States Civil Service Commission."

Having reference to Government's Exhibit 13, headed "Office of Strategic Services," purportedly signed by Carl A. Marzani, entitled, "Tender of resignation from the position of assistant chief, presentation division, $5,600, for the reason: Military service."

And there is noted, as counsel for the defendant brought out in examining the last witness, in pen, there appears to be

POOR COPY

BLEED THROUGH

written on this exhibit, "He is detailed back to OSS and is retaining his badge and other identification."

Having reference to Government's Exhibit 14,
108 it is a document headed "OSS personnel action request."

The name of Carl A. Marzani appears thereon, "War service appointment," and it relates to the position of deputy chief, presentation branch, CAF-14, at a salary of $7,175; under effective date, it says:

"September 20, 1945, as soon as possible."

Under "Remarks" is the following:

"Mr. Marzani is being released from the Army on 17 September. It is desired to return him to his civilian status with this branch."

It is dated September 13, 1945, and bears the signature of M. L. Brockdorff.

Government's Exhibit 15 is on a Civil Service form, No. 332, entitled, "Application for federal employment."

The date of the application is September 27, 1945, purportedly signed by Carl A. Marzani.

Government's Exhibit 16, entitled "Office of Strategic Services," dated September 20, 1945, addressed to Carl A. Marzani.

"Nature of action: War service appointment.
"Effective date: 20 September, 1945."

It announces his appointment to the Office of Deputy Chief, Presentation Branch, CAF-14, at $7,175 per annum.

And Government's Exhibit 17, entitled "Oath of office, affidavit, and declaration of appointee," purportedly signed
109 by Carl A. Marzani on the 4th day of October, 1945, before Virgyl E. Hall—OSS, on October 4.

* * * * *

Q. Mrs. Newman, I show you what has been
154 marked for identification Government's Exhibit 22 and it is noted that it consists of fifteen pages.

* * * * *

Mr. Kelley. We offer the exhibit in evidence, your Honor. I believe that Court and counsel have copies.

Mr. Ford. Yes. But I would like to ask a preliminary question.

Mr. Kelley. Surely.

155 By Mr. Ford:

Q. In addition to the fifteen pages, which is what you typed up from your notes, don't you have attached to it an exhibit?

A. There is attached some handwritten notes.

Q. Yes, and I am talking about an exhibit, known as Exhibit A.

A. Yes, in the front.

Mr. Ford. Your Honor, it is agreed that through oversight Mr. Kelley overlooked the exhibit.

There is no particular significance to having not brought it out.

Mr. Kelley. May the witness be temporarily excused until we can call one who can identify that portion, and I will have her back on the stand after that.

Mr. Ford. I just want to identify what is in there.

Mr. Kelley. All right.

By Mr. Ford:

Q. So to get it clear, the hearing which you took down stenographically and then reduced the notes, comprise these fifteen pages?

A. That is right.

POOR COPY

BLEED THROUGH

Q. Then on top of this, as you will note, is Exhibit A, which is a photostat of an instrument. That also is a part of the hearing; correct?

A. I can't say for sure.

156 Q. Well, now, for instance, isn't the testimony here which you transcribed, while they were putting the questions to Mr. Marzani and he was answering, wasn't this referred to and handed to him, and wasn't he asked to look at it, and he identified it?

A. Yes, it was.

Q. I mean, that is it; one that was used. Correct, to the best of your knowledge? Is that right?

A. That is right.

Q. Then in addition to those instruments on the back, there is another exhibit which is in handwriting, consisting of five pages; right?

A. Yes.

Q. That also was part of the hearing that Mr. Marzani was in; correct?

A. As I recall, this is in addition to the testimony Mr. Marzani made after we gave him the trial; when he was given these typewritten pages to proofread and sign that they were correct, he made these corrections.

Q. That is right. So that these four sheets represent corrections made by Mr. Marzani after it was handed to him to see if he had any corrections to me. He said "Yes," and these are the corrections he wrote down; correct?

A. That is right.

157 Mr. Ford. I have no objection to the offer.

It may be received in evidence.

The Court. All right.

(Government's Exhibit 22 for identification was received in evidence.)

* * * * *

158 So I offer 22 and 25 in evidence; all being part of the one transaction.

Mr. Ford. So the photostat is No. 25; right?

Mr. Kelley. Correct.

The Court. Will you gentlemen come to the bench a minute?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Ford. Of course, we reserve as to competence and relevancy, as we agreed before, in exhibits, which is part of the motion which I am not repeating at this time.

* * * * *

160 Mr. Kelley. Exhibit 25 being the photostat, I will, with the Court's permission, pass among the jury for their perusal.

I am reading now from Exhibit 22, consisting of fifteen pages:

"Report of special hearing

Carl Aldo Marzani, c/o Mr. Hugh C. Barton, Route #3, Vienna, Virginia.
Applicant for the position of Economic Editor, Office of Coordinator of Information (Investigation at their request), E. O. 8564.

POOR COPY

BLEED THROUGH

Special hearing conducted November 23, 1942, in room 517 Mather Building.

Special hearing conducted by Charles N. Keating, Sr. Investigator.

Witnessed by: John H. Finlator, Jr. Investigator.

Stenographer: Selma S. Newman.

Mr. Keating: In the course of investigation as to your character and qualifications for the position of Economic Editor, a number of matters were revealed which were either discrepant, or misleading or which might reflect on your character, loyalty or
161 qualifications for employment in this position.

It is an established policy of the United States Civil Service Commission that these matters be brought to your attention, affording you opportunity to present such answers or explanations you wish to make. Such answers or explanations will be included as a part of the report made on your case so that the Commission will have them for consideration in arriving at a decision.

I should like to present these matters to you at this time. It is the practice of the Commission to receive your statement or explanation under oath. Do you have any objection to taking an oath?

A. No.

(Whereupon

CARL ALDO MARZANI

was duly sworn and stated as follows:)

Q. What is your full name and present address?
A. Carl Aldo Marzani, Vienna, Virginia.
Q. What is your address in Vienna?
A. It is rural delivery, that is the address.
Q. With whom do you live there?
A. Myself and my wife.
Q. When and where were you born?
A. Born in Rome, Italy, March 4, 1912.

162 Q. When did you come to this country?

A. 1924, September first or second, something like that. Labor day, the day before Labor day.

Q. How was your citizenship derived?

A. Through my father.

Q. Have you ever used any other name?

A. No.

Q. What is the maiden name of your wife?

A. She has had a couple, Eisner is her maiden name at birth, she was on the stage and used the name of Emerson.

Q. What is her full stage name?

A. Edith Emerson.

Q. Were her parents named Eisner?

A. Yes.

Q. What are their names?

A. Stanley Eisner and Babette Eisner.

Q. Where do they live?

A. 403 Center Street, South Orange, New Jersey.

Q. What is Mr. Eisner's occupation?

A. Manufacturer.

Q. Is your wife employed?

A. No.

Q. What is your present position?

A. I am Chief of the Editorial Section of the Presentation Division of the Research and Analysis
163 Branch of the Office of Strategic Services.

Q. Who is your supervisor there?

A. Mr. H. C. Barton, Jr.

Q. Had you known Mr. Barton prior to your employment at the Office of Coordinator——

A. (Interposing) No.

Q. Who are some of the people here in Washington who would know you real well, social acquaintances who would know of your character and reputation?

A. Prof. Paul Studenski, I believe he is at OPA.

POOR COPY

BLEED THROUGH

Q. How long have you known him and what has been the nature of your association?

A. I have known him for the last three years, he was my—I worked very closely with him at New York University where I was working before I came down. As I think over, probably no one in Washington who would know me over a year, people who would know me would be at my old college, Williams College. I don't believe there is anyone in Washington, Dr. Baxter, who is head of the University, but I believe he has gone back to Williams College, he is president of Williams College.

Q. Who knows you well in New York City?

A. Primarily, people at the university.

Q. Would you care to name some of them?

A. Dr. Walter Sparr, he is head of the Eco-
164 nomics Division, Dr. Muntz, Dr. Nathan, I believe he is at Vassar now, Otto Nathan, he was in Washington from time to time, as a matter of fact, probably at OPA.

Q. Are these social acquaintances and professor associates?

A. Yes, people who are—who have seen a great deal of me.

Q. What trips abroad have you made since entering the country?

A. Well, I only went out of the country twice, no once, I spent a week in Canada, but hitchhiked so there is probably no record, I also hitchhiked to Mexico, I had to sign immigration blank though.

Q. When was that?

A. When the Morro Castle burned, 1934. Then I left this country late 1936, I think it was September or late August, around there, and then I was out of the country entirely until early 1939. That was about three years in which I spent most of it in England, I was studying at Oxford, I was at Ox-

ford, after I left Oxford I went around the world, India, China, Japan, and came back to San Francisco in May 1939.

Q. What countries in Europe did you visit other than England?

A. Well, all of them except Italy, Russia and
165 Finland and the Baltic States and Poland. In other words, I was in every country except the extreme northeastern section. I think that is about right. Bulgaria, I guess I missed and Greece, I think that is about all.

Q. What were you doing in those countries?

A. When?

Q. After you left England.

A. Just going through.

Q. What——

A. (Interposing) Motive? Just to look at them.

Q. What——

A. (Interposing) Means? Hitch-hiked mostly. I spent $550 for myself and my wife for the whole trip.

Q. Do I understand that you did some writing while in Europe?

A. Yes, I did. I wrote as I recall, two articles for Ken magazine, I wrote one article for the London Spectator.

Q. Were those articles written under your own name?

A. Yes.

Q. What was the title of the articles written in Ken?

A. I don't remember the titles, one was on Germany, travel, the other was on certain documents captured in Spain, Italian, which were released, I forget who it was, Spanish Ministry of Information, I translated those documents. For the London
166 Spectator I wrote an article on Barcelona in late 1936.

POOR COPY

BLEED THROUGH

Q. Were you in Spain during the civil war?

A. I was.

Q. In what capacity?

A. Observer, writer, just on my own.

Q. Were you writing for any particular paper?

A. No.

Q. Did the magazine Ken furnish any funds to you?

A. No. Anything I wrote was as a consequence of having gone, rather than of having made prior commitments.

Q. Did you participate in any way in the events taking place in Spain at that time?

A. No, except being there. I was with the anarchists in North Arragon, spent considerable time, several weeks with them, you know—sat around and talked.

Q. Are you speaking of the anarchists or the loyalists?

A. The anarchists were a part of the loyalists.

Q. Who sponsored your trip to Spain?

A. Nobody.

Q. Were you traveling under the American State Department passport?

A. That is right. I don't think there will be any record of it. In that time there was no special record. I have my passport, it is visaed, you can see that.

167 Q. By whom in Spain?

A. I don't know. I have no recollection, it is on the thing. Soon after I came back, about two months, the State Department stamped all passports, not valid for travel in Spain, that was before that. That is why there is no special record.

Q. Were you ever employed by the London Daily Herald?

A. No, we had an arrangement, they wrote a letter for me to the effect that they would hire me

if I could go down, that was later, about a year, year and a half, they would have given me a job and I tried to get a visa from the State Department, this was considerable later, I had wires from Paris to the State Department and they turned it down. All they would do is tell me they had a letter for me to the Consul to the effect that they would use material which I would write if I could get a visa, they would not get the visa for me, it was contingent.

Q. How much time did you spend in Spain altogether?

A. About two months, I should think, probably less.

Q. Can you give me the dates that you wrote for Ken Magazine?

A. Close enough so you can find them. It was in 1937, probably, it was number two issue of Ken, the other one was a little later. The Spectator was
168 about, I don't know the same time, roughly, for six months in 1937, somewhere in there.

Q. Now, who made contact for you with the loyalists in Spain?

A. Nobody. It was very simple, I went up and said I wanted to go and that is all there was to it. Remember this, it is the early days, they were more than happy to have anybody go down and look at it. They wanted as many people as possible to see what was going on.

Q. Were you in the Spanish Loyalist Army?

A. No.

Q. The Commission has received information to the effect that you were affiliated with the Abraham Lincoln Brigade. Is that true?

A. It isn't true.

Q. Were you affiliated with the American organization known as the Friends of the Abraham Lincoln Brigade?

POOR COPY

BLEED THROUGH

A. No. I suppose you realize that just being in Spain would naturally give rise to a lot of information.

Q. Do you know Edwin Rolfe?

A. No.

Q. What boat did you leave New York on?

A. I think it was the American Banker, American President, it was American something, you can find that very easily.

169 Q. Did that take you direct——

A. (Interposing) To London.

Q. After you returned to this country where did you then take up residence?

A. Well, I stayed with my wife's family for quite a while, about four or five months, then I went on relief and I lived at 643 6th Street and I resided there until I left for Washington.

Q. Approximately how long were you on relief?

A. About two or three weeks, very short time, I got a job on WPA in New York University.

Q. The Commission has received information to the effect at the time that you and your wife applied for relief you both stated to the Department of Welfare of New York City, that your wife's mother died in childbirth at Joplin, Missouri, and that subsequently thereto in 1936 her father died and gave that as a reason for seeking relief, that is, that you were unable to obtain help from anyone in your immediate family. What comment would you have to make on that?

A. None.

Q. Is the information correct?

A. Could be. I wouldn't want to say yes, I mean, you know, it is possible that it was said. You
170 must remember it was a long time ago.

Q. Do you know whether or not that was said?

A. No, I am not trying to be facetious, probably some such thing was said, I honestly don't remember.

Q. Then it is quite possible too that that information was given out by you?

A. Possible, it is also possible it may have been given by my wife. I remember something was said for us to get on relief, whether I said it or my wife said it.

Q. Do you recall the case workers coming back to your home and making further inquiry concerning your wife's parents?

A. No, I don't recall.

Q. Who were you living with at that address?

A. My wife.

Q. Anyone else?

A. No, from time to time various friends stayed with us.

Q. Do you know Ruth Gikow?

A. Yes.

Q. Didn't she live at that address with you?

A. No, I don't think so. She stayed a few days I imagine, but I can't recall just when or where.

Q. Wasn't the lease in her name?

171 A. No.

Q. Whose name was the lease in?

A. Mine.

Q. What did Ruth Gikow do?

A. What do you mean?

Q. Her occupation.

A. An Artist. I think she was on WPA. I am not sure just when, we saw her very seldom, she was someone we had met and saw from time to time, three or four months.

Q. Do you know Reva Helfond?

A. No. At least I don't recollect the name right now.

Q. Didn't she live at that address part of the time too?

A. I don't think so.

POOR COPY

BLEED THROUGH

Q. Do you recall her working for the WPA?

A. I just don't recall the name, I know a lot of people on WPA, artists, she may have been one of them.

Q. When you gave the Welfare Department of the City of New York your past residence why did you fail to give the address of your father and mother-in-law in East Orange, New Jersey?

A. Well, the answer to that is simply we would not have gotten on relief, well, I mean, the situation
172 was impossible, I don't go—you know—my relationship with my in-laws is not such that I could live in their home.

Q. In other words, is it your opinion that had you given the Welfare Department the true facts concerning your father and mother-in-law and their address in East Orange, New Jersey, that you would not have obtained relief?

A. I don't know, frankly. I think if my wife had been on relief alone, probably not, in my case we couldn't take the chance. I don't know to what extent my in-laws are legally entitled to take care of me. They are probably responsible for my wife."

May I interrupt. It is indicated that that answer was correct; right?

Mr. Ford. I have a little "y" here opposite the answer.

Mr. Kelley. On page 8 of the added sheet the "y" is there. Did you find it?

Mr. Ford. Yes.

Mr. Kelley. Read it.

Mr. Ford (reading):

"I certainly would have"——

And then a word is written and a line through it.

—"obtained relief for myself personally and that is the important fact, since only through being on relief could I get a job on WPA. It is a fact
173 that I was entitled to and would have received relief. On the other hand, my wife alone would probably not have received relief. Both applying together, I don't know what the outcome would have been. Probably yes, since I am legally responsible for my wife and not her parents. I don't know to what extent my in-laws are legally responsible for me."

Now we will go back to the testimony.

Mr. Kelley. Page 8.

Mr. Ford. I have it.

Mr. Kelley. We overlooked an earlier correction, if we could go back to page 7, I will repeat the question.

If you will repeat the answer, then we will go to the correction.

Mr. Ford. I have it.

Mr. Kelley. Going back and repeating the question on page 7:

"Q. Then it is quite possible too that that information was given out by you?

A. Possible, it is also possible it may have been given by my wife. I remember something was said for us to get on relief, whether I said it or my wife said it."

Now we will go back to the correction. Now, reading the correction, which appears in handwriting:

174 "Possible, but not likely. In all probability it was given by my wife."

Now going back to page 8 and picking up with the testimony:

POOR COPY

BLEED THROUGH

Referring, I think you will agree with me, to the defendant's wife's parents, the question was:

"Q. But you had lived with them five months prior to going on relief.

A. That is exactly the point. You can stay with them for a certain length of time but you can't stay there indefinitely.

Q. Did you feel that justifies one in making false statements concerning their existence?

A. Well, I mean—I am just not prepared to argue the ethical problem involved, that is all.

Q. The Commission has also received information to the effect that you advised the Welfare Department of the City of New York that you had no bank account but that as a matter of fact you did at the time have some money in an English bank.

A. Oh, that is not true. I had an open account in an English bank, maybe $5 in it. As an actual fact, I kept an open bank account because there were various odds and ends which were owed me, $5 here and there, secondly as I traveled around I had travelers checks from the bank, there may have been
175 $15 or $20. There is no question it is peanuts in the way of living. As far as I know I owe the bank money, I owe them a couple of dollars. I have had no dealings with the bank since I left England."

And that suggests a correction, I think. And I have it handy here for you.

Mr. Ford. Continuing that answer by way of correction:

"I may owe the bank money, perhaps a couple of dollars of carrying charges."

Mr. Kelley. Referring back now to the top of page 9:

"Q. Was your wife also employed by WPA in New York?

A. I think for a very brief period, she was when I was ill, it was a common practice to allow substitution.

Q. What were the circumstances surrounding the termination of her employment at WPA?

A. I believe she was asked to leave under some provision, I forget what it was, because she signed a petition for the Communist Party."

Mr. Ford. I show a correction there. Do you?

Mr. Kelley. Yes. Is that "4"?

Mr. Ford. That is a correction where he speaks of what his wife did.

The Court. I think that is just a check mark.

Mr. Kelley. Yes, it is just a check mark across there.

176 Mr. Ford. No relation at all?

Mr. Kelly. No.

Mr. Ford. All right.

Mr. Kelley. The question was:

"Q. Was that the extent of her participation in the activities of the Communist Party?

A. I think so.

Q. The Commission has received information that in your home at the various addresses which you had in New York City there was a large amount of Communist literature. Was there any particular reason for that?

A. I don't know if there was a large amount, I don't know if there was any particular reason.

Q. Do you recall any amount of Communist literature?

POOR COPY

BLEED THROUGH

A. I remember seeing leaflets, if you live on the East Side you can't help seeing them.

Q. In your own home?

A. Yes, they are stuck under doors regularly.

Q. Did you or your wife participate in the distribution of it?

A. Am I answering for me or my wife?

Q. You may answer for both.

A. For myself, no, for my wife she can talk for herself, I don't know.

Q. The Commission has received information to
177 the effect that early in 1940 your wife circulated Communist Party petitions. Did you assist her in that circulation?

A. I don't recollect her doing it and I certainly did not assist her.

Q. Were you a member of the Teachers Union in New York City that was removed from the American Federation of Teachers?

A. I don't know about that. I was no member of no Union."

Mr. Ford. Now, that suggests a correction. "b", page 9.

"I was not a member of the Teachers' Union."

Mr. Kelley. Now starting again:

"Q. The Commission has received information to the effect that you were a member of the East Side Defense Council. Is that information correct?

A. That is true.

Q. What is the nature of that organization?

A. It was an organization under the presidency of the Councilman of the City of New York for the East Side and devoted primarily for civilian defense.

Q. What was the Councilman's name?

A. Myer Goldberg.

Q. Did you have office in the organization?

178 A. Yes.

Q. What office did you hold?

A. Secretary.

Q. Who were some of the other officers?

A. Rev. Zabek, I think the initial is R. He was—I don't remember the church, the Polish Church, Rev. Rector of the Church. There was a Rabbi Newman, Julius Newman.

Q. What was his capacity?

A. He was also vice president. There was a Mr. L. Sverdlove, he is a trade unionist, there was a Mr. Alfred Tanz, a lawyer, there was Mr. Harry Schlacht, publisher of the East Side News. I think there was a Rabbi Berman Bergman, I am not sure if he was vice president or director, I know he came to policy meetings. I think there was a Mr. Solender, a social worker, that is a he, Sanford Solender. It should be extremely easy to get everybody.

Q. When did that organization come into existence?

A. Late 1941, I think September or October, October I guess it was.

Q. Was that organization affiliated with the International Workers Order?

A. No.

Q. Was there any connection between the two

179 groups at all?

A. No.

Q. Were you a member of the International Workers Order?

A. I think I was for a brief period, I don't recall, I know I was asked several times, that is why I say I may have been, if so it was a very short period, I found the medical benefits were not what I wanted. It was insurance."

POOR COPY

BLEED THROUGH

Mr. Ford. Now, that suggests a correction—"c".

"I do not recall."

Mr. Kelley. That corrects his answer. The question being:

"Were you a member of the International Workers Order?"

The answer here says:

"I think I was for a brief period."

That portion was corrected to say:

"I do not recall."

Mr. Ford. That is right; correct.

Mr. Kelley. We will go back to the testimony now:

"Q. Did you have insurance in the organization when you were in?

A. That is what I am saying, I may have been a member, membership gives medical benefits, but I just don't recall if I was or how long. I did recall when I looked at the benefits they were not what I
180 wanted. My wife was ill and I wanted specialist benefits.

Q. Do you recall whether you contributed any money to the organization?

A. No, I don't.

Q. Did your wife receive any benefits from it?

A. I just don't recall.

Q. What other organizations have you been affiliated with other than religious, fraternal, labor or union?

A. What do you mean beside that? You mean the Oxford Dramatic Society?

Q. Such as that.

A. I was a member of the Williams Club, Oxford Dramatic Society, that is probably about all I guess.

Q. Do you recall any others?

A. Could be. I just don't recall any at present.

Q. Do you know Eugene Morley?

A. Yes.

Q. Who is he?

A. He is a boy I knew in Scranton, Pennsylvania, about 15 years ago, 14 years ago. I have known him ever since from time to time. In the last 8 or 9 years we didn't see as much of each other as we used to. He was an artist and I would stay with him when I came down from New York.

181 Q. What does he do?

A. You mean in the 15 years?

Q. What is he doing now?

A. The last few years? Art work of various sorts. He is an expert on silk screens.

Q. Didn't you circulate some nominating petitions for Earl Browder?

A. No.

Q. The Commission has received information to the effect that on February 22, 1941, you spoke at a Defend America Rally at Manhattan Plaza, 66 East 4th Street, New York City, under the auspices of the International Workers Order; is that information correct?

A. What was the date, please?

Q. February 22, 1941.

A. Well, I don't remember exactly. Could be. I don't know about the date, as secretary of the Defense Council I spoke to innumerable rallys under all auspices. It could be one of those, I wouldn't want to say yes, any particular date. I do not deny that I could have spoken to one or several for that matter.

Mr. Ford. Now, it suggests a change there.

"I spoke to meetings of the American Legion, Jewish religious and fraternal organizations,

POOR COPY

BLEED THROUGH

churches, synagogues, Democratic and Republican
182 clubs, settlement houses, boys' clubs, youth clubs, Chamber of Commerce, schools, parent-teachers meetings, market associations, and dozens of others. It could be one of those. I wouldn't want to say yes, any particular date. I do not deny that I could have spoken to one or several, for that matter."

Mr. Kelley. Now back to the testimony:

"Q. Including the International Workers Order?

A. Including the International Workers Order."

Mr. Kelley. And there is a correction here.

Mr. Ford. Yes, there is one at "e".

"May I point out that in the East Side of New York, that organization reaches into many families, and its large rallys have audiences that fill large halls. It was my duty as Executive Secretary of the Defense Council to speak to meetings of citizens whenever possible."

Mr. Kelley. Now back to page 12, I believe:

"Q. Do you recall specifically speaking under the auspices of the International Workers Order?

A. Well, that is what I was trying to remember when I asked for the date. I just don't recall but it could have well been. I don't wish to imply that I wouldn't.

Q. Have you ever been a member of the German-American Bund?

183 A. No.

Q. Have you ever been a member of any Nazi group?

A. No.

Q. Have you ever been a member of any Fascist organization?

A. No.

Q. Are you now or have you been a member of the Communist Party?

A. No.

Q. Have you ever attended meetings of the Communist Party?

A. I don't think so.

Q. Have you ever belonged to any organization which was affiliated with the Communist Party?

A. No.

Q. Have you ever used the name of Tony Whales?

A. No.

Q. Have you ever used a name similar to that?

A. No.

Q. Has your wife ever used the name of Edith Charles?

A. No, as far as I know.

Q. The Commission has received information to the effect that you were a section organizer for the Communist Party on the East Side in New York City under the name of Tony Whales. What com-
184 mend do you have to make?

A. The answer is no.

Q. The Commission has received information to the effect that you made speeches against the conscription bill, is that information correct?

A. No.

Q. Have you ever signed a nominating petition for the Communist Party?

A. I could have. Yes, I think I could have.

Q. Well, have you?

A. Well, the answer I give you is, the FBI brought to my attention the fact that they thought I had, I couldn't recall, but I don't recall any specific instance, it could be yes.

POOR COPY

BLEED THROUGH

Q. (Handing a photostat copy of a Communist nominating petition to Mr. Marzani). I will hand you Exhibit A which is a photostatic copy of a nominating petition for the Communist Party to which your name is purportedly signed on January 19, 1940, and I will ask you if that is your signature.

A. Yes, it is.

Q. Do you now recall signing it?

A. I don't recall—well, yes, I do, as a matter of fact, now that I see the date. It was early 1940, I don't remember the day, but I remember there was
185 occasion to sign the petition at that time.

Q. What were the circumstances surrounding this petition being presented to you for signature?

A. I think it was a campaign to elect Mr. Browder."

Mr. Ford Then there is a "g".

Mr. Kelley. The last sheet.

Mr. Ford. I will read the complete answer:

"I think it was a campaign to elect Mr. Browder. In fact, I recollect the occasion now. Mr. Browder had just been sentenced to what I considered an unduly harsh sentence in view of the offense committed. It seemed to me a clear case of civil liberties. I may add that the sentence was later commuted by Presidential order, I believe on grounds of undue harshness."

Mr. Kelley. At the top of page 14, now:

"Q. You were aware of that at the time, were you?

A. Yes.

Q. Did you read the petition before signing it?

A. Not too carefully, but I knew what I was signing.

Q. Among other things contained in that petition is the statement that you intend to support the candidates of the Communist Party. Did you intend at the time to give active support to the Communist Party candidates?

A. I don't recall my intentions at the moment. I—what I meant to accomplish by signing my name
186 was to nominate them.

Q. Have you signed any other Communist petitions?

A. Not that I can recollect.

Q. Do you know Henry Cooper, who witnessed your signature?

A. No.

Q. Do you know Israel Amter?

A. No, I know the name.

Q. Have you met him?

A. No.

Q. Do you know Morris Salkind?

A. No.

Q. Do you know Carl Brodsky?

A. No.

Q. Do you know Ada Brodsky?

A. No.

Q. Do you know Gertrude Ackerman?

A. No.

Q. Do you know Earl Browder?

A. No.

Q. Do you feel you have had a fair and impartial hearing today?

A. Yes.

Q. Do you feel you have had ample opportunity to answer the questions?

187 A. Yes.

Q. Do you feel you have had ample opportunity to answer the questions?

A. Yes, indeed.

POOR COPY

BLEED THROUGH

Q. Is there anything further you want to add to the record touching upon any of the matters we have discussed or anything else that might affect your suitability? The record is open.

A. I have nothing to say since I have seen no evidence—am I on trial here?

Q. No.

A. Then there is nothing to say. On the question which you asked have you spoken at the International Workers Rally, the answer is, on the East Side there are numerous organizations of all kinds and it may quite possibly be that I spoke at the International Workers Rally among all the others I have spoken."

Mr. Kelley. Which concludes the transcript, the Exhibit No. 22.

Mr. Ford. Yes.

* * * * *

199 Mr. Kelley. While I tendered these two prospective exhibits to the defense counsel, so he could go over them before I proceed to offer them in evidence, I will make the offer immediately on the basis that
200 the indictment charges that the investigation in the fifth, sixth, seventh, eighth and ninth counts was conducted in accordance with rules and regulations of the United States.

I offer it in evidence on the basis of its certification, and also the other document which we will come to in a moment.

Mr. Ford. That is the other one you handed me?

Mr. Kelley. As constituting a certified copy of the rules and regulations of the Civil Service Commission in relation to the conduct, the nature and standards to be followed in investigations concerning loyalty.

Mr. Ford. This is the other one you handed me (indicating).

The Court. All right, sir.

I will receive these.

Mr. Kelley. Let the record show the exhibit we have been talking about is Government's Exhibit 24.

The Court. And that is Departmental Circular No. 222, of June 20, 1940.

Addressed to Heads of Departments and Independent Establishments.

(Government's Exhibit 24 for identification was received in evidence.)

Mr. Ford. The next one you handed me was 24-A, wasn't it, Mr. Kelley?

201 Mr. Kelley. 24-A; yes.

Mr. Ford. I object on the same grounds as to that, your Honor.

The Court. That being what, sir?

Mr. Kelley. It is certified as being offered for the same basis, as a regulation of the Government.

The Court. As to what, sir?

Mr. Kelley. To the conduct of hearings.

The Court. The procedure following the requesting of removals?

Mr. Kelley. Yes, sir.

The Court. Rules and regulations of the Civil Service Commission?

Mr. Kelley. Yes, sir.

The Court. It may be received.

Mr. Ford. Over my objection.

(Government's Exhibit 24-A for identification was received in evidence.)

* * * * *

POOR COPY

BLEED THROUGH

Government
Exhibit 24

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

June 20, 1940
CX:JF:am.

Departmental Circular No. 222

Subject: Removal of undesirable persons from Government Service

To Heads of Departments and Independent Establishments:

"Attention is invited to Section I of Civil Service Rule XII, regulating removals from the classified service, which reads as follows:

> 'No person in the classified service of the United States shall be removed therefrom except for such cause as will promote the efficiency of the service, and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as also shall the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Commission shall also, upon request, be furnished copies of the same"

"It will be noted from the foregoing rule that all that is required to effect the removal of an employee from the classified service is that he be given notice of the charges against him in writing and afforded a reasonable time to answer in writing. No examination of witnesses is required nor any trial or hearing except in the discretion of the officer making the removal.

"Section 2 of Rule XII requires that in removals, reductions, and other disciplinary actions, like penalties be imposed for like offenses and that no discrimination be exercised for political or religious reasons. Section 9A of the Act of August 2, 1939, the so-called Hatch Act, however, provides as follows:

> '(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> '(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.'

"It will be noted from the foregoing statute that the removal of any person who is a member of a political party or organization which advocates the overthrow of our constitutional form of Government in the United States is mandatory. This ground for removal, therefore, constitutes an express statutory exception to the provision in Section 2 of Civil Service Rule XII prohibiting removals for political reasons.

POOR COPY

BLEED THROUGH

"The Civil Service Commission has implemented Section 9A of the Hatch Act by ruling that as a matter of official policy it will not certify to any department or agency the name of any person when it has been established that he is a member of the Communist party, the German Bund, or any other Communist, Nazi, or Fascist organization. This ruling is parallel to subsection (4) of section 15 of H. R. Res. 544, making appropriations for work relief and relief for the fiscal year 1941, which was passed by the House of Representatives of May 23, 1940."

This subsection reads as follows:

"No alien, no Communist, and no member of any Nazi Bund organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution and no part of the money appropriated in this joint resolution shall be available to pay any person who has not made or who does not make affidavit as to United States citizenship and to the effect that he is not a Communist and not a member of any Nazi Bund organization, such affidavit to be considered prima facie evidence of such citizenship and that he is not a Communist and not a member of any Nazi Bund organization."

The attention of all departments is further invited to the fact that every employee of the Government who has taken an oath of office has sworn (or affirmed) that he will support and defend the Constitution of the United States against all enemies foreign and domestic and that he will bear true faith and allegiance to the same.

"In view of the exigencies of the times, the Commission believes that Government agencies may freely take

these matters into consideration in determining whether the removal of a particular employee 'will promote the efficiency of the service' within the meaning of Section 1 of Civil Service Rule XII. Final decision in that respect in any event rests with the department or agency concerned, and the Commission is expressly prohibited by the civil service rules (Section 4, Civil Service Rule XII) from reviewing the findings of a removing officer or investigating any removal or reduction unless it is alleged with offer of proof that the *procedure* prescribed by Section 1 of Rule XII has not been followed, or that the removal was made for political or religious reasons. As stated above, however, membership in a political party or organization which advocates the overthrow of our constitutional form of government constitutes a ground for mandatory removal and the Commission, therefore, will not investigate any removal which the department or agency reports was made pursuant to Section 9A of the Hatch Act." (Italics supplied)

Representatives of any agency who desire to secure more detailed information with respect to the separation of undesirable employees should contact Mr. James E. Hatcher, Associate Chief of the Commission's Investigations Division.

By direction of the Commission:

Very respectfully,

S/. L. A. MOYER
L. A. Moyer
Executive Director and
Chief Examiner

POOR COPY

Government's
Exhibit 24-A

Affidavit of Examining Director and Chief Examiner

LAM:am

December 12, 1940

The Commission:

Minute 1 of October 28, 1940 was adopted in an effort to prevent delays in the submission to departments and agencies of requests for the removal of employees. There is still some confusion in handling this type of case because the minute of October 28, 1940 merely amended Minute 2 of September 9, 1936. I am, therefore, recommending that Minute 2 of September 9, 1936 and Minute 1 of October 28, 1940 be revoked and the following minute adopted in lieu thereof:

Procedure followed in requesting Removals

Before recommending the removal of an employee, the Investigating Division shall, either in a personal interview or through correspondence, acquaint the employee with the nature of the derogatory or unfavorable evidence and give him an opportunity to submit evidence in explanation or rebuttal.

When the foregoing procedure has been followed and a decision has been reached to request the removal of an employee, the submission of the request to the department or agency concerned will not be delayed and any appeal from the action taken must be initiated by the employee, his representative or the Government agency in which he is employed.

Where the retention of an individual pending completion of investigation and final action by the Commission would constitute an immediate danger or menace to the service, the department or agency concerned should be advised informally of the nature of the charges and the evidence secured so that the department or agency may on its own initiative take whatever protective measures it considers warranted.

Minute 2 of September 9, 1936 and Minute 1 of October 28, 1940 are revoked.

L. A. Moyer
Examining Director and
Chief Examiner

212 Mr. Kelley. My next evidence will be of the transcript of the hearing. I want to identify it. Before the Board of Appeals and Review, it was. These documents give rise and explain why such hearing was held in the first place, because he appealed from a previous finding of ineligibility, requested an appeal to the Board, and my next item of proof is that there was a hearing had. It is offered solely for that purpose.

The Court. If you want it to be received, sir, I will receive them.

Mr. Ford. No objection, your Honor.

213 (Government's Exhibits 26, 27, and 28, for identification, were thereupon received in evidence.)

(Counsel returned to the trial table.)

POOR COPY

BLEED THROUGH

Mr. Kelley. The Government desires permission to read to the jury Government's Exhibits 26, 27, and 28.

The Court. All right.

Mr. Kelley. Government's Exhibit 26 is asserted to be a certified copy of the original document in the files of the United States Civil Service Commission.

It is dated January 9, 1943, addressed to Mr. James B. Opsata, Personnel Officer, Office of Strategic Services, Washington, D. C.

It is a letter from L. A. Moyer, Executive Director and Chief Examiner.

It reads:

"Dear Mr. Opsata:

"In compliance with the request contained in your letter of March 9, 1942, the Commission has made an investigation concerning Mr. Carl A. Marzani, serving in the Research and Analysis Branch of your establishment, the appointment having been made under Executive Order 8564 subject to investigation.

"As a result of the investigation the Commission has reached the conclusion that Mr. Marzani's suitability for responsible Government employment has
214 not been established. He has, therefore, been rated ineligible and your agency is requested to separate him from his position and to advise the Commission when such action has been taken. In effecting this separation the provisions of Civil Service Rule XII need not be observed.

"There is enclosed for the confidential information of your agency a copy of an analysis of the evidence on the basis of which the Commission made its decision.

"By direction of the Commission:

"Very respectfully,"

Again, the date of that letter is January 9, 1943.

Government's Exhibit 27, being a certified photostat of an original document from the files of the United States Civil Service Commission. It bears the letterhead of Office of Strategic Services, Washington, D. C. The letter is dated February 10, 1943. It is addressed to Mr. L. A. Moyer, Executive Director and Chief Examiner, U. S. Civil Service Commission, Washington, D. C. It is signed by James B. Opsata, Director of Personnel, Office of Strategic Services.

It reads:

"Dear Mr. Moyer:

"This is in reference to your letter of January 9, 1943 (File BAR: AK:MGW) setting forth the
215 results of the investigation conducted on Mr. Carl A. Marzani.

"Mr. Marzani has been notified that he has been rated ineligible. It is our understanding that he will appeal the Commission's decision. The office of Strategic Services is not appealing the decision but until the results of the appeal are known we wish to allow Mr. Marzani to continue working in his present position.

"Expeditious processing of the appeal will be appreciated."

And Government's Exhibit 28 is a certified copy of a photostat of an original document in the files of the United States Civil Service Commission.

It likewise appears on the letterhead of the Office of Strategic Services, Washington, D. C., and is dated February 10, 1943.

It is addressed to the Board of Review and Appeals, Civil Service Commission, Washington, D. C.

POOR COPY

It is signed by Carl A. Marzani, Chief, Editorial Section, Presentation Division.

There is a notation that a copy goes to Mr. James B. Opsata.

It reads:

"Dear Sirs:

"I have been notified by the Director of Per-
216 sonnel of the Office of Strategic Services that the Civil Service Commission holds that my suitability for Government employment has not been established. I should like to make formal appeal of this decision to your body.

"This request for appeal is being taken with the knowledge of Mr. James B. Opsata, Director of Personnel of the Office of Strategic Services.

"I should greatly appreciate an opportunity to discuss this matter with you and to ascertain the basis of the Commission's findings."

* * * * *

286 Mr. Kelley. I offer it in evidence.

The Court. It may be received.

(Government's Exhibit No. 18 for identification was received in evidence.)

Mr. Kelley. I request permission of the Court to read it to the jury.

The Court: Yes, you may read it.

Mr. Kelley. Members of the jury, this is a certified photostatic copy of a letter dated December 20, 1946, addressed to Mr. Carl Aldo Marzani, from J. Anthony Panuch, Deputy Assistant Secretary for Administration.

"Dear Sir:

"After careful consideration, it is deemed necessary and advisable in the interests of the United States that your employment in the Department of State be terminated. Accordingly, pursuant to the provisions of Title 1 of Public Law 490, 79th Congress, 2nd Session, you are hereby advised that your employment in the Department of State is hereby terminated, effective as of the close of business December 20, 1946."

287

* * * * *

Mr. Kelley. Now, if the Court please, I offer on the basis of this certification, Government's Exhibits 31 and 32, which counsel has observed, and I understand raises no objection to their receipt in evidence.

334

Mr. Ford. That is correct, your Honor.

(The exhibits were handed to the Court.)

The Court. Very well, sir, they may be received.

(Government's Exhibits 31 and 32 were marked for identification and received in evidence.)

Mr. Kelley. I desire permission to read them to the jury, or portions of them.

The Court. Very well, sir.

Mr. Kelley. Government's Exhibit 31, a certified photostatic copy of an official document from the files of the United States Civil Service Commission, is dated July 29, 1943, and addressed to the Office of Strategic Services, Washington, D. C., attention of Director of Personnel.

POOR COPY

"Gentlemen:

"Reference is made to your letter of February 10, 1943, in regard to Mr. Carl A. Marzani, presently employed as Economic Editor in your agency.

"Careful consideration has been given to Mr. Marzani's entire record, including representations
335 made by him and for him at a hearing before the Board of Appeals and Review of this office. The conclusion has been reached that he meets the standards of suitability maintained for appointment in the Federal service, and the Commission has rated him eligible for Government employment. The request that his services be terminated is accordingly withdrawn.

"By direction of the Commission:

"Very respectfully,
"L. A. Moyer"

Government's Exhibit 32 is a certified photostatic copy of an original document from the files of the United States Civil Service Commission.

It is dated July 29, 1943, and addressed to Mr. Carl A. Marzani, c/o Mr. Hugh C. Barton, R. F. D. 3, Vienna, Virginia.

"Dear Mr. Marzani:

"Reference is made to your personal appeal from the action taken in requesting the Office of Strategic Services to terminate your services as Economic Editor because of apparent unsuitability for Government employment.

"Careful consideration has been given to your entire record, including the representations made by you and for you at the hearing before the Board of Appeals and Review of this office. The conclusion
336 has been reached that you meet the standards of

suitability maintained for appointment in the Federal service. The Commission is pleased to advise you that you have been rated eligible for Government employment.

"By direction of the Commission:

"Very respectfully,
"Wm. C. Hull"

* * * * *

Mr. Ford. May it please your Honor, before this,
397 in accordance with your Honor's directions, I will stipulate that as to Government's Exhibits 34-A, 34-B, and 34-C, that the signature thereon in each of them at the bottom is the signature of the defendant Carl Marzani.

* * * * *

Mr. Kelley. In view of the stipulation, your
399 Honor, the Government offers in evidence Exhibits 34-A, 34-B, and 34-C.

Mr. Ford. That is, we consent to that and agree to it with the proviso of what was involved in the motion. It is with that reservation.

The Court. Yes, sir. They will be received in evidence.

(Government's Exhibits 34-A, 34-B, and 34-C, were received in evidence.)

* * * * *

458 By the Court:

Q. Do you know whether any memberships were solicited either for the Congress or for the Communist Party there that night, sir?

A. At the meeting in the Church?

Q. At the Church meeting, yes.

A. Yes, sir. We asked people to join the National Negro Congress, East Side Council. We gave them the names and addresses of persons, some who joined that night, and those who didn't join that night, they were given names of persons who were the responsible leaders of the Council.

Whether or not there was any solicitation for membership in the Communist Party, that I don't know.

* * * * *

666 By Mr. Ford:

Q. I will ask you whether or not, on August the 24th, you made a statement, either written or oral, that the comrades at a party at Jean Madof's, 408 East 10th Street, included Bob Appel, Frances Sutton, Louis Harper, Elsie Harper, all members of C. P., 6th A. D.

A. Yes, sir.

* * * * *

The Court. I wanted to say something to Mr.
677 Ford, Mr. Kelley.

Mr. Ford, when you do make your opening statement, I ask you to be governed by the issues in this case, so that it won't be necessary for me to say anything.

Mr. Ford. What I am going to say, I think, are all the issues in this case and are properly admissible.

The Court. I dislike to interrupt people in the midst of things and inject them.

Mr. Ford. I don't mind, your Honor.

The Court. If you do go beyond what I believe to be the issues, I will ask you to come up here.

Mr. Ford. I will stop immediately.

678 The Court. But I will do it so as not to make it appear I am cutting in on you.

Mr. Ford. Any signal from your Honor and I will immediately come up.

(Counsel returned to the trial table.)

The Court. Mr. Ford, you may proceed with your opening statement.

OPENING STATEMENT ON BEHALF OF DEFENDANT

By

MR. CHARLES E. FORD

* * * * *

681 That there came a time in 1941, about the spring, and the war clouds at that time were very strong and there was considerable unrest in this neighborhood amongst the different nationalities; so, honestly believing war was imminent and equally honest that it was not, the neighborhood got together before we were attacked and they organized what later became known as the National Defense Committee, and the city authorities in New York, led by a Meyer Goldberg, I think was his name, who was then a councilman in the city, went and these people solicited Mr. Marzani and asked him to organize the neighborhood and see if he could get the different nationalities to forget

POOR COPY

their particular differences and all unite in preparedness, because at that time President Roosevelt was telling all of the citizens to organize and prepare, and that that was one of the first——

The Court. Mr. Ford, May I interrupt you, sir?

Mr. Ford. Yes, sir.

* * * * *

858 (Thereupon Defendant's Exhibits 9 and 10 for identification were received in evidence.)

* * * * *

Mr. Ford. Ladies and gentlemen of the jury, I
860 am now going to read from Defendant's Exhibit number 9, the official document which the Court has admitted in evidence.

It has here, "Department of State, Payroll Period. Carl A. Marzani, Deputy Chief, Carl A. Marzani, Carl A. Marzani." And down at the bottom it reads:

"Terminated effective November 15, 1946, COB, pending leave status, per form 184."

In addition, Defendant's Exhibit number 10, being this document, has at the top, "Payroll Section. From L. F. Brockdorf; name of administrative officer; division; presentation; first floor; Washington Auditor number," then the phone number.

"Subject: Change in Personnel."

"Please note the following change in personnel, effective 11-15-46."

"Name: Carl A. Marzani."

Then there are three blocks opposite each. One is:

"Entered or duly transferred."

The other:

"Terminated."

And the one "Terminated" has a check mark in it.

Then at the bottom it says:

"Please send all monies due to Carl A. Marzani, 508 North Fillmore Street, Arlington, Virginia.".

861 At the bottom it has "Department of State, Notice of Changes in Personnel."

* * * * *

987 By Mr. Kelley:

Q. Coming to the time when you state you had returned to this country, worked your way eastward
988 and to New York City and environs, I believe you said you first took up residence where?

A. With my wife's parents.

Q. And their name is what?

A. Stanley Eisner and Babette Eisner.

Q. Where do they live?

A. South Orange, New Jersey.

Q. They are in comfortable circumstances?

A. Yes.

Mr. Ford. I object as being immaterial.

Mr. Kelley. I am laying a foundation, your Honor.

The Court. Suppose you approach the bench.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

POOR COPY

BLEED THROUGH

Mr. Kelley. Your Honor, this witness has put his character in evidence for veracity, truth, honesty, integrity and loyalty.

I intend to prove by this witness that he, in the presence of his wife, went to welfare agents in the City of New York in 1939, and in his presence the statement was made by his wife in connection with an application he had made for relief for both of them, that her parents were dead.

That her mother had died at the time of her birth in Joplin, Missouri, and other statements to that effect, all when they were alive, well, and in comfortable cir-
989 cumstances at the time, in New Jersey.

I submit that it is entirely proper.

Mr. Ford. I object to anything his wife did. He is talking about what his wife did and I object to any evidence about what his wife did. He did not put his wife's integrity into issue and it is not in issue in this case. It is his own.

The Court. What are you going to show about his part in it, Mr. Kelley?

Mr. Kelley. I am going to show that he went with his wife and that he filed an application for relief for himself and wife, and that with his wife he went to the welfare department and in his presence and in the presence of the witness, she made the statement and possibly he did too, but I don't have to go that far, the statement was made by her that her parents were dead, and so on, as indicated, in his presence, and certainly that would affect his veracity in connection with those circumstances.

The Court. Let me ask you definitely:

Are you going to be in a position to show that that was done either by him or in his presence?

If you are going to show it definitely, that is one thing, but if you are not going to show it, that is another situation.

Mr. Kelley. Yes. The matter appears also par-
990 tially by admission in the proceedings.

But I have the transcript of the WPA reporter, to this issue.

If he denies it, I am in a position to establish it.

Mr. Ford. I ask that he be required to show that to your Honor first.

Mr. Kelley. I will be glad to.

The Court. Very well.

Mr. Kelley. I can bring into court, I am informed, the persons who made these reports (handing reports to the Court).

The Court. This is her father, in here (indicating)?

Mr. Kelley. Yes, sir.

(Whereupon, the Court perused the document.)

The Court. Is this the only place that you refer to about the death?

Mr. Kelley. This document is certified on the rear, but I am informed that I can get the witness here to testify to the facts contained therein.

(Whereupon, Mr. Ford perused the document.)

Mr. Ford. It does not show that he did anything at all.

The Court. He was present during that time, sir.

Mr. Ford. It does not say that he was present at that time here at all (indicating). The paragraph your Honor referred to, I find nothing in there that says he was present.

That is to say, the paragraph beginning with
991 "Mrs. M." And ending up with the word "address."

The Court. This is all relating to the interview of 8:30.

POOR COPY

Mr. Ford. Furthermore, the best evidence is the person who made the interview.

Mr. Kelley. I am just laying a foundation.

The Court. Yes. My purpose here was to make sure that we were not getting in something that he could not support, sir.

Mr. Ford. I object to anything about his wife or his wife's parents.

The Court. I understand what you are trying to do is lay the foundation so that you can show that he was present when these things were shown.

Mr. Kelley. Yes, your Honor, and if he denies it, I will produce the proof to that effect.

The Court. Very well, sir.

Mr. Ford. Further, I object, if he is laying a foundation, that he not repeat what was said, but only be limited to laying foundation and whether he was there at a certain time.

The Court. He would have to identify it further than that, sir?

Mr. Ford. Then it would be too late, and the jury
992 would have heard what he said.

The Court. I will let him answer the question.

(Counsel returned to the trial table.)

Mr. Kelley. Your Honor, I would like to take two or three minutes, and if you want to recess now I can get some papers together and save some time.

The Court. Very well.

Ladies and gentlemen, you are excused for a few minutes, with the same admonitions as heretofore given you by the Court.

(There was a brief informal recess, at the conclusion of which the proceedings were resumed, as follows:)

The Court. Mr. Kelley and Mr. Ford, will you come to the bench, please?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. Mr. Kelley, I want to be doubly sure that there is no question about the proof as to Mr. Marzani and his wife being present at the time.

Mr. Kelley. That is my information, your Honor.

In the first instance, it is in the report and the date is there.

May I get the report and show it to your Honor?

The Court. Yes.

993 (Mr. Kelley obtained the report.)

Mr. Kelley. Moreover, if there is any doubt in your Honor's mind, I want to get the transcript of the proceedings.

The Court. Mr. Kelley, I will deny it at this time anyhow.

Mr. Kelley. May I renew this request later?

The Court. Yes.

Mr. Kelley. May I ask him if he was present during a conference with the welfare department agent and was his wife present during the time the question of whether the parents were living was discussed?

And would your Honor rule on that? Just, was he present at a visit where a representative of the department

POOR COPY

BLEED THROUGH

of welfare, himself and his wife, at which time there was a conversation had concerning the death of the parents? I will stop there.

The Court. All right, sir.

Mr. Ford. There is a part of the hearing which I have marked off which relates to all of this.

In the Board of Review hearing he was asked quite a bit about this, and that is also a part of that record.

The Court. I have not read it as yet, Mr. Ford.

Mr. Ford. But just in passing, your Honor might want to remember it.

The Court. Of course, Mr. Kelley, you will un-
994 derstand that he is supposed to be present at the time the particular thing happened, and that is continuously present.

Mr. Kelley. Yes.

The Court. And you will not go further?

Mr. Kelley. No.

(Counsel returned to the trial table.)

By Mr. Kelley:

Q. Mr. Marzani, when you first took up residence in New York City, where did you live?

A. I lived for about a month somewhere on East 30th, I think.

Q. With whom?

A. My wife.

Q. Did someone else live——

A. No, I am sorry, sir. I misunderstood your question. I thought you meant after I came back. I take it you mean before.

Q. No, I mean after you came back from Europe. When you first lived in New York City, where did you live at that time?

A. For about a month somewhere on East 30th.

Q. Did someone else live at that place besides you and your wife?

A. No.

Q. Did you ever live in an apartment leased by a
995 Miss Gickow?

I don't believe so, sir.

Q. State whether or not during the year 1939 you were ever visited by a worker in the department of welfare, New York City, on which occasion the worker for the department of welfare, you, and your wife, were present, during which time a conversation was had concerning the date and place of death of your wife's parents.

Mr. Ford. I object.

The Court. On what basis, Mr. Ford?

Mr. Ford. First, that it has not been identified as to when the meeting took place.

The Court. Can you place the time, sir?

Mr. Kelley. I have placed it in the year. It is for the witness to answer, if he can; during the year 1939, I have made it as broad as possible for him.

Mr. Ford. But I think that is not the only objectionable feature of it.

The Court: Can you make it any more specific, sir?

Mr. Kelley. If your Honor please, I do not desire to.

I have asked the witness "any time during 1939, did such a thing take place?"

Mr. Ford. I object to it.

The Court. I will let him answer it.

POOR COPY

The Witness. I was visited by the department
996 of welfare officials, sir. That much is yes. Specifically, in the detail you have just outlined, I cannot recall.

By Mr. Kelley:

Q. During the periods that you had conferences with representatives from the department of welfare, was your wife present with you.

Mr. Ford. May I make my objection to all of this, please, so I won't have to repeat it?

The Court. Yes.

The Witness. I don't recollect, sir. I assume she must have been, at least part of the time.

By Mr. Kelley:

Q. Did you ever go with your wife to the department of welfare, service section, and converse with a representative of that agency?

Mr. Ford. I object, and ask that a time be located.

Mr. Kelley. I said if he ever did.

The Court. Do you recall the time, sir?

The Witness. No, sir.

May I answer the question?

The Court. Yes, sir; if you can.

Mr. Ford. May I have an objection and exception, your Honor?

The Witness. To the best of my knowledge, Mr. Kelley, since it is seven years ago, I know that I did go
997 to the welfare department; I know the welfare department came to me, but the details that Mr. Kelley is putting in, I really do not recollect.

Mr. Kelley. May we approach the bench for a minute, your Honor?

The Court. Yes.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice as follows:)

Mr. Kelley. I would like a moment's recess to make a telegraphic inquiry in an effort to get the agent here.

This witness has put in evidence as to his character and I assume the Court will not permit me to go into what he has testified to here on this point in the other hearing.

May I have a recess for a few minutes to put a request through to bring this witness here?

The Court. My whole point, sir, is to this: I don't want anything which is going to indicate that this man was, unless it is a fact that he was.

Mr. Kelley. If I am prepared to have a witness who will testify that in the presence of his wife and this defendant that statement was made, I understand the Court will admit it?

The Court. Yes, sir.

* * * * * *

The Court. Defendant's Exhibit number 1 is received.

1117 (Thereupon, Defendant's Exhibit No. 1 for identification was received in evidence.)

Mr. Ford. Members of the jury, Defendant's Exhibit No. 1 is an official record of the State Department,

1118 and I particularly desire to call the jury's attention to it here,

"Action Requested."

It has "Resignation" written out on the typewriter.

Then it has an ink line drawn above it.

Then above the word "Termination," and a line written through that and the word "Removal" written in its place.

Then down below where it had "Effective date," the date was written in here "COB, November 15, 1946."

Then an ink line was drawn through that and above it was written "December 20" in ink on this record.

* * * * * *